Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

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No. _____

In the

Supreme Court of the United States

Mrs. Tanya Meyer, Ph.D.,

Petitioner,

v.

Ronald Allen Meyer, Sr.,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

APPENDICES A-E

Mrs. Tanya Meyer, Ph.D.
2581 Fremont Drive
Lake Havasu City, AZ 86406
(520) 505-2842

115 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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No. _____

In the

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Mrs. Tanya Meyer, Ph.D.,

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v.

Ronald Allen Meyer, Sr.,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

APPENDIX A
DECISION OF DIVISION ONE
COURT OF APPEALS OF THE STATE OF ARIZONA

Mrs. Tanya Meyer, Ph.D.
2581 Fremont Drive
Lake Havasu City, AZ 86406
(520) 505-2842

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TANYA MEYER, PH.D.	)	1 CA-CV 99-0081
	)	
Petitioner-Appellant	)	DEPARTMENT B
	)	
v.	)	MOHAVE County
	)	Superior Court
RONALD ALLEN MEYER, SR.	)	No. NC 98-7002
	)	
Respondent-Appellee	)	ORDER
	)	
	)	

The above-entitle matter was duly submitted to the Court. The Court has this day rendered its Memorandum Decision.

IT IS ORDERED that the Memorandum Decision be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this Order together with a copy of the Memorandum Decision be sent to each party appearing herein or the attorney for such party and to the Honorable Randolph A. Bartlett, Judge.

DATED this 16th day of September, 1999,

/s/James B. Sult
James B. Sult, Judge

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TANYA MEYER, Ph.D.	)	1 CA-CV 99-0081
	)	
Petitioner-Appellant	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM
	)	DECISION
RONALD ALLEN MEYER, SR.	)	(Not for Publication-
	)	Rule 28, Arizona
	)	Rules
Respondent-Appellee	)	of Civil Appellate
	)	Procedure)
	)	

Appeal from the Superior Court of Mohave County

Cause No. NC 98-7002

The Honorable Randolph A. Bartlett, Judge

AFFIRMED

Tanya Meyer, Ph.D.
In Propria Persona — Lake Havasu City

Matthew G. Newman
Attorney for Appellee — Parker

S U L

T, Judge

Tanya Meyer, Ph.D., ("Appellant"), also known as Tanya Zappe, appeals from the trail court's denial of

her petition to : (1) declare an alleged marriage contract between her and Ronald Meyer (Appellee") valid, (2) permit a name change from "Tanya Zappe" to "Tanya Meyer," and (3) order the placement of Ronald Meyer's name onto the birth certificate of her child. For the following reasons, we affirm.

FACTS AND PROCEDURE

We construe the trial court's procedure as the granting of a motion for judgment on the pleadings in favor of Appellee pursuant to Arizona Rules of Civil Procedure Rule 12(c). Consequently, we assume as true all Appellant's well-pleaded facts and must limit review to those facts asserted by Appellant in the pleadings.1 In re 15453 N. Second Ave., 185 Ariz.. 35, 36 n.1, 912 P.2d 39, 40n.1 (App. 1996).

Appellant and Appellee were involved in a thirteen-year relationship. Appellant alleges that the relationship resulted in a marriage contract and the birth of a child, Ronald Meyer, Jr. Appellant claims that the marriage contract allotted child rearing responsibilities, financial support obligations, and dissolution rights. Furthermore, Appellant alleges that the marriage contract functioned in Arizona, California, Nevada, and Mexico. Notwithstanding the alleged existence of this contract, and in violation there, Appellee ended the relationship.

1.In her brief, Appellant recites facts not contained in either her original petition or the "motion to decide" which precipitated the trial court's ruling. However, these asserted facts were not before the trail court at the time of its December 15, 1998 order

and it is this order from which the appeal is taken. Therefore, we do not include or rely on those additional allegations of fact.

On October 23, 1998 Appellant petitioned the superior court to: (1) recognize the contractual marriage entered into by Appellant and Appellee, (2) permit her to change her name from "Tanya Zappe" to "Tanya Meyer, " and (3) order the addition of Appellee s name to the birth certificate of Ronald Meyer, Jr. On October 29, 1998, Appellee responded to the petition and denied the allegation of a contractual marriage. On November 30, 1998, Appellant filed a "motion to decide" with the superior court and on December 15, 1998, acting on the motion, the court denied relief to the Appellant finding she did not state a legal claim as there is no provision for a "contractual marriage" under Arizona law. Appellant filed a timely notice of appeal.

ISSUES

Appellant has raised seven issues on appeal. For the purposes of clarity we have reduced the issues to four:

I. Whether the failure of the trail court to notify Appellant of Appellee's response violated procedural due process?

II. Whether the trail court erred in finding that Appellant failed to plead sufficiently a marriage contract under Arizona Revised Statutes Annotated ("A.R.S.") sections 25-11 and 25-112 (Supp. 1998)?

III. Whether Arizona's requirements for marriage pursuant to A.R.S. violated constitutionally protected rights?

IV. Whether Appellee may be estopped from denying the existence of a marriage contract?

STANDARDS OF REVIEW

We will uphold an order granting judgment on the pleadings only if the moving party is clearly entitled to judgment; that is, if the claimant is not entitled to relief under any facts susceptible of proof under the claims pleaded. In re 15453 N. Second Ave., 185 Ariz.. at 36n.1, 912 P. 2d at 40n.1; Brosie v. Stockton, 105 Ariz.. 575, 577, 468 P.2d 933, 935 (1970). Furthermore, because the matter hinges upon the interpretation of the facts pleaded, this court's review is do novo. See PNL Asset Management Co., v. Brendgen & Taylor Partnership, 193 Ariz.. 126, 130, 970 P.2d 958, 961 (App. 1998).

Appellant's arguments based on constitutional violations and estoppel are raised for the first time on appeal. We have discretion to address these issues and have elected to do so. See Hawkins v. Allstate Ins. Co., 152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987).2

ANALYSIS

I. Violation of Procedural Due Process

Appellant contends that the failure to receive notice of Appellee's response to her petition violated her procedural due process rights under the Fourteenth Amendment to the United States Constitution. Assuming Appellee did fail to properly serve a copy of the response on her, Appellant still is not entitled to any relief.

2Appellee has failed to file an answering brief. We may, but are not required, to treat a failure to file an answering brief as a confession of reversible

error. Bugh v. Bugh, 125 Ariz.. 190, 191, 608 P.2d 329, 330 (App. 1980). In this case, we elect to address the merit of the issues raised by Appellant. Hoffman v. Hoffman, 4 Ariz.. App. 83, 85, 417 P.2d 717, 719 (App. 1966) (noting the discretion to review in spite of a failure to file an answering brief).

She claims she was deprived of an opportunity to obtain a hearing because she never knew Appellee filed a response. However, a hearing is not necessary for a trail court to judge the sufficiency of the pleadings under Rule 12(c). If her petition did not state a legally cognizable claim, the trail court was entitled to determine this as a matter of law and no evidence was required or permitted. Thus, Appellant's only allegation of prejudice from Appellee's failure to serve, namely the inability to obtain a hearing, is irrelevant.

II. Application of A.R.S. sections 25-11 and 25-112

Arizona law recognizes two methods for creating a valid marriage contract. The first method is pursuant to A. R. S. 25-111(B) which set forth two requirements for a valid marriage contract:

1. A license is issued as provided in this title, and
2. The marriage is solemnized by a person authorized by law to solemnize marriages, or by a person purporting to act in such capacity as believed in good faith by at least one of the parties to be so authorized.

Here, neither requirement was met. Consequently, the marriage contract allegedly entered into by Appellant and Appellee is not valid under A.R.S. section 25-111. See Moran v. Moran, 188 Ariz.. 139, 143, 933 P.2d 1207, 1211 (App. 1996).

The second methods, A.R.S. section 25-112(A) in essence recognizes marriages that are valid under the laws of the place where contracted. By this statute, Arizona allows for the recognition of marriages that fail to meet the Arizona statutory requirements, and this would include common law marriages so long as they are recognized in the jurisdiction where the parties resided. Even construing Appellant's pleading liberally, we find that Appellant failed to adequately plead a common law marriage in another jurisdiction. While Appellant insists on the existence or impliedly to a common law marriage in another jurisdiction. Therefore, the trail court was correct in finding the pleadings insufficient to support a claim for a marriage which could be recognized under Arizona law.

III. Validity of A.R.S., section 25-111

Appellant argues that the requirements of A. R. S., section 25-111 are unconstitutional under Article 1, section 10, clause 1 of the United States Constitution and the First and Fourteenth Amendments. Further, Appellant argues that the requirements are unconstitutional under Article 2, Section 25 of the Arizona Constitution. This court has previously addressed these challenges to A.R.S. section 25-111 and found them meritless in light of Arizona's police powers and vital interest in marriage. Moran, 188 Ariz.. at 143-45, 933 P.2d at 1211-13. Appellant has presented no reasons why reconsideration of Moran is appropriate here.

IV. Marriage by Estoppel

Appellant argues that Appellee should be estopped from denying the existence of the marriage

contract. Appellant's pleadings are completely insufficient to allege a claim of estoppel. See Toy v.Katz, 192 Ariz.. 73, 86, 961 P.2d 1021, 1034 (App.1997). In any event, we would not recognize estoppel as a means of validating a marriage in Arizona that was not entered into in this state in compliance with A.R.S. section 25-111. To do so would have the effect of permitting common law marriages in Arizona and would thereby contravene the public policy of this state.

CONCLUSION

The superior court was correct in granting judgment on the pleading. We therefore affirm the judgment.

/s/ James B. Sult
James B. Sult, Judge

No. _____

In the

Supreme Court of the United States

Mrs. Tanya Meyer, Ph.D.,

Petitioner,

v.

Ronald Allen Meyer, Sr.,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

APPENDIX B
JUDGEMENT OF MOHAVE COUNTY
SUPERIOR COURT OF THE STATE OF ARIZONA

Mrs. Tanya Meyer, Ph.D.
2581 Fremont Drive
Lake Havasu City, AZ 86406
(520) 505-2842

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MOHAVE

Honorable Randolph A. Bartlett, Judge
Division II
Date: May 25, 1999

Virnlynn Tinnell, Clerk

MINUTE ORDER

In re the Marriage of	
Tanya Meyer, Ph.D.,	NO. NC-98-7002
Petitioner,	STATE OF ARIZONA COURT OF APPEALS
and	NO. 1 CA-CV 99-0081
Ronald A. Meyer, Sr.,	
Respondent.	

Pursuant to the Court of Appeals Order, the Court has this date signed the Plaintiff's Order submitted with her Application. The Court, sua sponte, has modified the submitted Order by delineating that portion of the Order regarding the consolidation of this matter with Mohave County cause No.PA-97-4010, pursuant to Judge Pro Tempore Roth's January 5, 1999,

cc:
Tanya Meyer
2533 Fremont Place
Lake Havasu City, AZ 86403
Petitioner

Matthew G. Newman
P. O. Box 1352
Parker, AZ 85344
Attorney for the Respondent

Honorable Rebecca White Berch
Division I
Arizona Court of Appeals
1501 Washington Street
Phoenix, AZ 85007

Honorable Julie Sydney Rothe
Judge Pro Tempore

Honorable Randolph A. Bartlett
Division II

ZAPPE-MEYER VS. MEYER
Case NC 98-7002

ORDER

Pursuant to State of Arizona Court of Appeals, Order dated May 17, 1999 and good cause appearing therefore,

IT IS ORDERED the petitioner's "petition to change name and recognize a contractual marriage as a legal marriage and order addition of respondent's name to birth certificate" and respondent's response thereto, and his request for attorney's fees having been reviewed by the court and the court recognizing a separate matter 97 PA-4010 Zappe-Meyer VS Meyer is pending before commissioner Julie Rothe, the court finds that the petitioner's reasons alleging a "contractual marriage" are not justifiable under Arizona Law, and therefore, It is ordered denying Petitioner's Petition. It is furthered ordered denying Respondents request for Attorney's fees.

/s/ R.A. Bartlett 25 May 99
Honorable Judge Bartlett

A copy of the foregoing mailed this
_____ day of _____, 1999 to

Tanya Meyer
P. O. Box 3103
Lake Havasu City, AZ 86405

Matthew Newman
P. O. Box 1532
Parker, AZ 85344
Attorney for the Defendent

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MOHAVE

Honorable Randolph A. Bartlett, Judge
Division II
Date: December 15, 1998

Linda Seapy, Clerk

MINUTE ORDER

In re the Marriage of	)	
	)	
Tanya Meyer, Ph.D.,	)	NO. NC-98-7002
	)	
Petitioner,	)	
	)	
and	)	
	)	
Ronald A. Meyer, Sr.,	)	
	)	
Respondent.	)	
	)	

The Petitioner's "Petition to Change Name and Recognize 13 Year Contractual Marriage as a Legal Marriage and Order the Addition of Respondent's Name to Birth Certificate" and the Respondent's Response thereto and his Request for Attorney's Fees, having been reviewed by the Court and, the Court recognizing a separate matter, 97-PA-4010, Zappe-Meyer v. Meyer is pending before Commissioner Julie Sydney Rothe, this Court finds that the Petitioner's Reasons, alleging a "contractual marriage" are not justifiable under Arizona law; and therefore,

IT IS ORDERED denying Petitioner's Petition.

IT IS FURTHER ORDERED denying Respondent's request for Attorney's fees.

Upon the Court's own motion,

It is ordered consolidating this matter and PA 97-96-4010, Zappe-Meyer vs. Meyer. Both files are assigned to Commissioner Roth for all further proceedings.

cc:
Tanya Zappa
2533 Fremont Drive
Lake Havasu City, AZ 86403
Petitioner

No. _____

In the

Supreme Court of the United States

Mrs. Tanya Meyer, Ph.D.,

Petitioner,

v.

Ronald Allen Meyer, Sr.,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

APPENDIX C
DECISION
SUPREME COURT OF THE STATE OF ARIZONA

Mrs. Tanya Meyer, Ph.D.
2581 Fremont Drive
Lake Havasu City, AZ 86406
(520) 505-2842

Supreme Court
STATE OF ARIZONA

402 Arizona State Courts Building
1501 W. Washington Street
Phoenix, Arizona 85007-3231

Telephone: (602) 542-9396

December 14, 1999

RE: TANYA MEYER vs. RONALD A. MEYER, SR.
Supreme Court No. CV-0398-PR
Court of Appeals No. 1 CA-CV 99-0081
Mohave County No. NC 98-7002

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 9, 1999, in regard to the above-referenced cause:

ORDERED: Petition to Transfer to Supreme Court - Appeal of Decision Court of Appeals September 16, 1999 [Petition for Review] = DENIED.

A panel composed of Chief Justice Zlaket, Justice Feldman, and Justice McGregor participated in the determination of this matter.

Record returned to the Court of Appeals, Division One, Phoenix this 14th day of December, 1999.

Noel K. Dessaint, Clerk

TO:

Tanya Meyer, PO Box 3103, Lake Havasu City, AZ 86403-3103
Matthew G. Newman, Esq., PO Box 1532, Parker, AZ 85344-1532
Glen D. Clark, Clerk, Court of Appeals, Division One, Phoenix, Lexis-Nexis
West Publishing Company

Supreme Court
STATE OF ARIZONA

402 Arizona State Courts Building
1501 W. Washington Street
Phoenix, Arizona 85007-3231

Telephone: (602) 542-9396

December 29, 1999

Tanya Meyer, Ph.D.
P. O. Box 3103
Lake Havasu City, AZ 86403-3103

Re: Tanya Meyer v. Ronald A. Meyer, Sr.
Supreme Court No. CV-99-0398-PR
Court of Appeals No. 1 CA-CV 99-0081

Dear Dr. Meyer:

On December 23, 1999, you presented, at our counter, a "Motion to Reconsider or Notice of Appeal" along with a money order in the amount of $71.00. Pursuant to your request, I am providing this letter confirming that I rejected this document for filing and your money order at our filing counter on December 23, 1999.

As I told you, I am authorized by the Arizona Supreme Court to reject for filing documents that do not comply with Court Rules or are prohibited by Court Rules. Rule 22(d) does not permit the filing of a motion for reconsideration from an order denying a petition for review unless permitted by specific order of the Court.

You further indicated that you thought that some type of notice of appeal was necessary or required in order to pursue your case in the United States Supreme Court. This will further confirm that I advised you that you were not correct and that you must file any petition for certiorari pursuant to United Supreme Court Rules with the United States Supreme Court.

For your additional information, filing fees in the Arizona Supreme Court are set by statute. There is no $71.00 fee.

Despite our discussion on December 23, 1999, you delivered by Express Mail, an original and seven copies of the same document crossing out the words "Motion to Reconsider or" leaving the "Notice of Appeal". You also included the $71.00 money order. The package was received on December 27, 1999. Once again, this document will not be filed nor processed in the Arizona Supreme Court since it is not authorized by law or court rule. If you are seeking review in the United States Supreme Court, you must follow the rule of that court.

I am also returning and enclosing with this letter your money order dated December 23, 1999, No. 6070018057 in the amount of $71.00. Your original document will be maintained with our copy of this letter.

Very truly yours,

/s/ Noel K. Dessaint
Noel K. Dessaint
Clerk of the Court

NKD:dk
encl.

cc: Glen D. Clark, Clerk, Court of Appeals, Division One, Phoenix
Matthew Newman, Esq.
P. O. Box 1532
Parker, AZ 85344-1532

No. _____

In the

Supreme Court of the United States

Mrs. Tanya Meyer, Ph.D.,

Petitioner,

v.

Ronald Allen Meyer, Sr.,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

APPENDIX D
COURT ORDER BEING VIOLATED

Mrs. Tanya Meyer, Ph.D.
2581 Fremont Drive
Lake Havasu City, AZ 86406
(520) 505-2842

Babbitt and Bartlett, P. C.
Attorney at Law
McCulloch Blvd., Suite
Lake Havasu City, AZ 86403
(602) 855-8104(?)

Attorney for the Petitioner

SUPERIOR COURT OF THE STATE OF ARIZONA
FOR THE COUNTY OF MOHAVE

In re the Marriage of	
	CASE NO. 17601
Tanya Helen Zappe,	
Petitioner,	DECREE OF DISSOLUTION OF MARRIAGE
AND	
Frederick C. Zappe,	
Respondent.	

The above entitled matter having come as regularly for hearing before the Court and Petitioner, Tanya Helen Zappe apearing in person and with counsel, D. S. BABBITT, and Respondent having failed to appear or respond in this motion an Affidavit of Default and Entry of Default having been entered on November 6, 1981, and testimony is wise best offered,

The Court finds that Respondent herein was a resident of Mohave County for more than ninety days

prior to the filing of the Petition, that the Property Settlement Agreement entered into by the parties and as file here in, has been examined by the court as far as it has jurisdiction to do .. and it has been found that the provisions therein are by these term, not unfair or unjust, that Petitioner is a fit and proper person to have the care, custody and control of the parties' minor child, Jamie Jay Zappe, that Petitioner, Tanya Helen Zappe desires the return of her maiden name, Tanya Helen Field, that the marriage is irretrievably broken and that there is no reasonable prospect of reconciliation.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. The marriage previously existing between the parties is dissolved;

2. That the care, custody and control of the parties' minor child, JAMIE JAY ZAPPE, is awarded to Petitioner, TANYA HELEN ZAPPE, without visitation rights to Respondent.

3. That no child support be awarded.

4. That the Property Assignment Agreement entered into by the parties is approved and incorporated and .....with this Decree.

5. That TANYA HELEN ZAPPE, shall henceforth be known as TANYA HELEN FIELD.

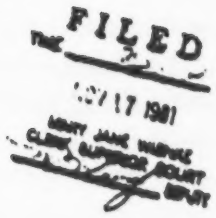
DONE IN OPEN COURT this 17th day of November, 1981.

/s/Gary R. Pope
Judge of the Superior Court

State of Arizona
County of Mohave
I, Linda Seapy, Clerk of the Superior Court of the State of Arizona in and for the County of Mohave do hereby certify the foregoing to be a full, true and correct copy of the original on file in my office.

Witness my hand and seal of said Court this 20th day of January, 1989.
/s/ Lister Foster
Clerk/Deputy Clerk

(Please note: This is a transcription of the original document which is difficult to read in parts. A copy of the original is included in this appendix on the next two pages.)



[redacted] Attorneys for Petitioner

[redacted] SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

In re the Marriage of	CASE NO. 17611
TANYA HELEN SAPPE,	
Petitioner,	DECREE OF DISSOLUTION OF MARRIAGE
and	
FREDERICK C. SAPPE,	
Respondent.	

The above entitled matter having come on regularly for hearing before the Court and Petitioner, TANYA HELEN SAPPE appearing in person and with counsel, D. S. BARRETT, and Respondent having failed to appear or respond in this action and an Affidavit of Default and Entry of Default having been entered on November 9, 1981, and testimony having been offered,

The Court finds that Respondent herein was a resident of Mohave County for more than ninety (90) days prior to the filing of the Petition, that the Property Settlement Agreement entered into by the parties and on file herein, has been examined by the Court so far as it has jurisdiction to do so and it has been found that the provisions therein are, by their terms, not unfair or unjust, that Petitioner is a fit and proper person to have the care, custody and control of the parties' minor child. JAB 2 JAT

LAPPS, that Petitioner, TANYA HELEN LAPPS desires the return of her maiden name, TANYA HELEN FIELD, that the marriage is irretrievably broken and that there is no reasonable prospect of reconciliation.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. The marriage previously existing between the parties is dissolved.

2. That the care, custody and control of the parties' minor child, JAMIE JAY LAPPS, is awarded to Petitioner, TANYA HELEN LAPPPS, without visitation rights to Respondent.

3. That no child support be awarded.

4. That the Property Settlement Agreement entered into by the parties is approved and incorporated and merged with this Decree.

5. That TANYA HELEN LAPPS, shall henceforth be known as TANYA HELEN FIELD.

DONE IN OPEN COURT this 17th day of December, 1981.

[redacted]
Judge of the Superior Court

STATE OF ARIZONA
COUNTY OF MOHAVE ss:

I, LINDA SCAFF, Clerk of the Superior Court of the State of Arizona in and for the County of Mohave do hereby certify the foregoing to be a full, true and correct copy of the original on file in my office.

Witness my hand and seal of said Court this [redacted] day of [redacted] 19[redacted].

[redacted]
Deputy Clerk

No. _____

In the

Supreme Court of the United States

Mrs. Tanya Meyer, Ph.D.,

Petitioner,

v.

Ronald Allen Meyer, Sr.,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

APPENDIX E
OTHER RELEVANT COURT ORDERS

Mrs. Tanya Meyer, Ph.D.
2581 Fremont Drive
Lake Havasu City, AZ 86406
(520) 505-2842

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR COUNTY OF MOHAVE

HONORABLE JULIE SYDNEY ROTH, JUDGE PRO TEMPORE MOHAVE VALLEY-BULLHEAD CITY JUDICIAL DISTRICT
DATE: JANUARY 24, 2000

VIRLYNN TINNELL, CLERK

MINUTE ORDER

TANYA MEYER, Ph.D.,	)	
	)	
Petitioner,	)	NO. PA-97-4010
v.	)	
	)	
RONALD A. MEYER, SR.,	)	
	)	
Respondent.	)	
	)	

Petitioner has filed a pleading entitled "Petition for Specific Performance:.

Inasmuch as this case involves a Lake Havasu City party or parties, and pursuant to telephone conference call with Division II, this file is ORDERED reassigned to Judge Randolph A. Bartlett, Division II, for all further handling.

cc:

TANYA MEYER PHD
PO BOX 3103
LAKE HAVASU CITY, AZ 86405
Petitioner

MATTHEW G. NEWMAN
PO BOX 1532
PARKER AZ 85344

Honorable Randolph A. Bartlett
Division II

Honorable Gary R. Pope
Presiding Judge

(informational copy)

Honorable Julie Sydney Roth
Judge Pro Tempore

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR COUNTY OF MOHAVE

HONORABLE RANDOLPH A. BARTLETT, JUDGE
DIVISION II
DATE: FEBRUARY 7, 2000

VIRLYNN TINNELL, CLERK

MINUTE ORDER

TANYA MEYER, Ph.D.,	)	
	)	
Petitioner,	)	NO. PA-97-4010
v.	)	
	)	
RONALD A. MEYER, SR.,	)	
	)	
Respondent.	)	
	)	

Pursuant to a telephone conference call with Judge Pro Tempore Julie S. Roth, this file is ORDERED reassigned back to Judge Roth for all further proceedings.

cc:

TANYA MEYER PHD
PO BOX 3103
LAKE HAVASU CITY, AZ 86405
Petitioner

MATTHEW G. NEWMAN
PO BOX 1532
PARKER AZ 85344

Honorable Gary R. Pope
Presiding Judge
(informational copy)

Honorable Julie Sydney Roth
Judge Pro Tempore

Honorable Randolph A. Bartlett
Division II

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR COUNTY OF MOHAVE

HONORABLE JULIE SYDNEY ROTH, JUDGE PRO TEMPORE MOHAVE VALLEY-BULLHEAD CITY JUDICIAL DISTRICT
DATE: FEBRUARY 28, 2000

VIRLYNN TINNELL, CLERK

MINUTE ORDER

TANYA MEYER, Ph.D.,	)	
	)	
Petitioner,	)	NO. PA-97-4010
v.	)	
	)	
RONALD A. MEYER, SR.,	)	
	)	
Respondent.	)	
	)	

This Judge Pro Tempore has reviewed this file upon reassignment of the case back to me.

Petitioner's Petition for Specific Performance requests improper relief. The Court takes no action on that pleading.

As to Petitioner's Petition for Correction of Birth Certificate, to the extent this is a request that Mr. Meyer's name be added to Ronald Jr.'s birth certificate as the legal father,

ORDERED granting this Motion based upon the DNA results and ORDERING that Ronald Al. Meyer, Sr. be added as the legal father to the birth certificate for Ronald Meyer, Jr., born September 28, 1989. The Court signs this Minute Order this date and directs the Clerk to provide a certified copy to the Office of Vital Records in Phoenix, Arizona.

Dated: February 28, 2000 /s/ Julie S. Roth
JULIE S. ROTH,
JUDGE PRO TEMPORE

cc:

TANYA MEYER PHD
PO BOX 3103
LAKE HAVASU CITY, AZ 86405
Petitioner

MATTHEW G. NEWMAN
PO BOX 1532
PARKER AZ 85344

Darci D. Farrell
Assistant Attorney General
Division of Child Support Enforcement
Attorney for the State
Atlas No. 0001476792-00

MANAGER
OFFICE OF VITAL RECORDS
2727 WEST GLENDALE AVENUE
PHOENIX AZ 85051

Honorable Julie Sydney Roth
Judge Pro Tempore

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RONALD ALLEN MEYER, SR.,	)	1CA-CV 99-0329
	)	
Petitioner-Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM
	)	DECISION
TANYA ZAPPE (FIELD) MEYER,	)	(Not for Publication-
	)	Rule 28, Arizona
Respondent-Appellant.	)	Rules of Civil
	)	Appellate Procedure

Appeal for the Superior Court of La Paz County

Cause Nos. LC-98000024 and DO-99000028

The Honorable Michael Irwin, Judge

AFFIRMED

Matthew G. Newman
Attorney for Appellee — Parker

Tanya Zappe (Field) Meyer, In Propria Person
Appellant — Lake Havasu

F I D E L, Presiding Judge

1 This appeal concerns two orders of protection, both of which were entered on behalf of Appellee Ron Meyer ("Ron") against Appellant Tanya Zappe (Field) Meyer ("Tanya"). The first order was entered in November 1998 in Parker Justice Court. Tanya moved to dismiss, her motion was denied, and she appealed to the superior court. There, the first order was vacated when Ron failed to pay the filing fee; Ron responded by letter, which the court treated as a motion for new trial; and on March 12, 1999, the court denied Ron's motion for new trial. On the same date, however, the superior court issued Ron the second order of protection. Tanya objected to the second

order and was denied relief at a March 29 hearing. In a timely notice of appeal, Tanya identified two issues: (1) lack of notice of the motion for new trial that Ron filed when the first order was vacated, and (2) that the second order of protection should not have been entered.

2. In briefs filed with this court, Tanya addresses two issues and many others. We do not consider the other issues, however, for they are outside the scope of her notice of appeal and outside the scope of the trail court orders from which the appeal arises.

3. We first consider Tanya's argument that she did not receive timely notice of Ron's letter requesting a new trial or of the court's minute entry treating the letter as a motion for new trial. Although both documents bear notations that they were mailed to Tanya at the post office box address that she had filed with the court, we do not dispose of this issue on that basis. It suffices, instead to reiterate that Ron's motion for new trial was denied. By that motion, Ron south and failed to revive the first, vacated, order of protection. That order, accordingly remained vacated. When Ron obtained a second order of protection, Tanya sought and received a hearing on the second order. Accordingly, she was not aggrieved by any absence of notice concerning Ron's unsuccessful attempt to revive the first, vacated, order.

4. We turn to the question whether the trail court erred in entering the second order of protection. We review for abuse of discretion and to determine whether the order was supported by the evidence. See State v. Reinhardt, 190 Ariz. 579, 951 P.2d 454 (1997). Under Ariz. Rev. Stat. Ann. ("A.R.S.") section 13-3602 (G)(6)(1998), the trial court may "[g]rant" relief that is necessary for the protection of the alleged victim and ...that is proper under the circumstances." The order of protection directs Tanya to not contact or go near Ron at his residence and business, and to keep a distance of 200 feet at any other time. Ron testified that he is an insurance broker and that Tanya called him at home and at his office at all hours of the day and night, disrupting his business, harassing business associates, and disrupting his sleep. "She calls hundreds of times and she hangs up...in the middle of the night...She comes to my office." This evidence support the trail court's grant of protective relief pursuant to A.R.S. section 13-3602(G)(6).

5. For the foregoing reasons, we affirm.

/s/NOEL FIDEL
NOEL FIDEL, Presiding Judge

CONCURRING:
/S/THOMAS C. KLEINSCHMIDT
/S/THOMAS C. KLEINSCHMIDT, Judge

/s/REBECCA WHITE BERCH
/s/REBECCA WHITE BERCH, Judge

COURTS OF ARIZONA - LA PAZ COUNTY SUPERIOR COURT 1316 Kofa Avenue Parker, Arizona 85344 (520) 669-613

Ronald A. Meyer Plaintiff	Tanya Zappe (Field) Using Meyer Name Defendant	PETITION FOR ORDER OF PROTECTION [X] MODIFIED
12/15/39 Date of Birth	2533 Fremont Drive P.O. Box 3103 Address	
N/A Third Party and Relationship to Plaintiff	Lake Havasu City, AZ 86403 City, State, Zip Code, Telephone	LC-98000024 Case Number

NOTE: FEES MAY BE WAIVED OR DEFERRED IF YOU ARE UNABLE TO PAY

DO NOT FILL OUT ADDRESSES AND/OR PHONE NUMBERS BELOW IF YOU WANT THEM KEPT PRIVATE

Is an action for maternity, paternity, annulment, legal separation or dissolution of marriage (divorce) now pending?
[X] No [ ] Yes: Case Number (if known): _____ Where: _____

My (Plaintiff's) relationship to the Defendant is (check all that apply):

[ ] Married: Date of marriage: _____
[ ] Divorced: Date divorce granted: _____

[ ] Opposite sex living together now or in the past
[X] One of us is pregnant by the other or we have a child in common
[ ] Defendant is related to me: How? _____

E-9

COURTS OF ARIZONA - LA PAZ COUNTY SUPERIOR COURT 1316 Kofa Avenue Parker, Arizona 85344 (520) 669-613

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Is an action for maternity, paternity, annulment, legal separation or dissolution of marriage (divorce) now pending?
☒ No ☐ Yes: Case Number (if known): _____ Where: _____

My (Plaintiff's) relationship to the Defendant is (check all that apply):

☐ Married: Date of marriage: _____
☐ Divorced: Date divorce granted: _____

☐ Opposite sex living together now or in the past
☒ One of us is pregnant by the other or we have a child in common
☐ Defendant is related to me: How? _____

☐ Opposite sex living together now or in the past

☒ One of us is pregnant by the other or we have a child in common

☐ Defendant is related to me: How? _____

Have either of you been charged or arrested for domestic violence OR requested an Order of Protection or Injunction Against Harassment against the other? ☐ No ☒ Yes: If known: date, name of court, facts of case:

Within Parker Justice Court Case #CV980352 (Contact Bill Poindexter-Deputy) & La Paz County Sheriff - Contact Deputy Sullivan & Parker Justice Court & La Paz County Sheriff's - Court Records going over many past years

For the Court to issue an Order, the Defendant must have committed, or may commit, an act of domestic violence or some other good reason must exist. (Previous acts of domestic violence must have occurred within the past year unless the Defendant was in jail or prison or out of state.) Describe what the Defendant did or might do including whether you fear bodily injury or death. Be as specific as possible, giving the date or approximate date for each action.

ate(s)	Describe what happened
90 to es. Date:	Defendant has been incarcerated many times for Mental Illness condition of Paranoia Schizophrenia at UCLA, St. John's Hospital & various other CA & AZ mental institutions. Tanya Zappe (Field) insists on using my last name "Meyer" even though we have never been engaged and/or ever married. Defendant has previous violated prior Orders of Protection - issued by Parker Justice Court & most recently violated a 11/3/98 order signed by Mary Hamilton - Commissioner (see Deputy Daniel Sullivan's files & see Bill Poindexter - Parker Justice Court). Tanya Zappe (Field) has been stalking me for some time, both at my residence in Parker, AZ & Riverside, CA. She continues to call... Hundreds of times - at all hours of the day & night & either hangs up or insists on speaking to me.

Page 3, Continued

In addition & most serious... Tanya Zappe (Field) has physically stopped by my residence & office in Riverside, CA & in Parker, AZ & has attempted to cause trouble & commotion, even after plaintiff has tried every method possible to stop her stalking tactics. Tanya is known to have severe mental illness & dealing with her on a normal & rational level is virtually impossible. On February 13th & 14th, 1999 we had a witness (Micaela Sullivan) when defendant called & identified herself to witness. Deputy Daniel Sullivan (La Paz Co. Sheriff) then contacted defendant & advised her to restrain herself from contacting me... & cited her for disturbing the peace.

Please... Please... Issue Order of Protection providing me with some temporary measure of peace and tranquility...

Ronald A. Meyer
Plaintiff

DESCRIPTION OF DEFENDANT

SEX	RACE	DATE OF BIRTH	HEIGHT	WEIGHT	EYES	HAIR	SOC. SEC. NO.
F	White	4/13/60	5'8"	150	Hazel	Light Red	547-78-9021

5. I ask this Court to order the Defendant not to commit an act of "domestic violence" against me and/or persons named below and/or against my property AND make the following Order(s) (check which Orders you want):

- ☐ Waive or defer any fees. (Fill out separate affidavit.)
- ☐ Order the Defendant not to possess and/or purchase firearms and/or ammunition.
- ☐ Order the Defendant to surrender firearms and/or ammunition.
- ☐ Order the Defendant to participate in domestic violence counseling or other counseling.
- ☒ Order the Defendant not to contact me: ☒ in person; ☒ by phone; ☒ in writing; ☒ Through 2nd Party Indiv.

DO NOT FILL OUT ADDRESSES BELOW IF YOU WANT THEM KEPT PRIVATE

The following persons should be included within the protection of this Order for the following reasons:

Name and Address if different than yours (do not include yourself)	Relationship to you	D.O.B.	Reason(s)
Name: Susanne (Meyer) Mardirosian	Daughter	5/30/61	Defendant has made numerous hang up
Address:			calls to Susanne Mardirosian
Name: Scott Meyer	Son	8/18/63	Defendant has made numerous hang up
Address:			calls to Scott Meyer
Name:			
Address:			

☐ Keep my address private. (Do not check this box if the Defendant has lived with you at this address in the past five years.)

☒ Order the Defendant not to come on or near (LEAVE YOUR RESIDENCE ADDRESS BLANK IF BOX ABOVE IS CHECKED):

☐ My residence at: 3750 Yaqui Loop, Parker, AZ and/or 5282 King Street, Riverside, CA

Address:

☐ Keep my address private. (Do not check this box if the Defendant has lived with you at this address in the past five years.)

☒ Order the Defendant not to come on or near (LEAVE YOUR RESIDENCE ADDRESS BLANK IF BOX ABOVE IS CHECKED):

☐ My residence at: 8750 Yaqui Loop, Parker, AZ and/or 5282 King Street, Riverside, CA

☒ My place of employment (Name and Address): Ramco-Calzona Insurance Service, Inc.
Does the Defendant also work there? ☒ Yes ☐ No 5051 Canyon Crest Drive, Suite 200 Riverside, CA 92507

☐ School (Name and Address):

☐ Other address:

☐ Order that I be given the exclusive use of our residence (write address only if different from above):

☐ Other requests:

My Signature 3/10/99 Date

Attorney's Signature 3/10/99 Date

VERIFICATION

I swear or affirm that the contents of this Petition are true to the best of my knowledge.

Plaintiff or Third Party

SUBSCRIBED AND SWORN to before me on Cathy VanderWeydene 3-10-99
Judicial Officer/Clerk/Notary Date

OFFICIAL SEAL
CATHY VANDER WEYDENE
NOTARY PUBLIC - STATE OF ARIZONA
LA PAZ COUNTY
My Comm. Expires June 05, 1999

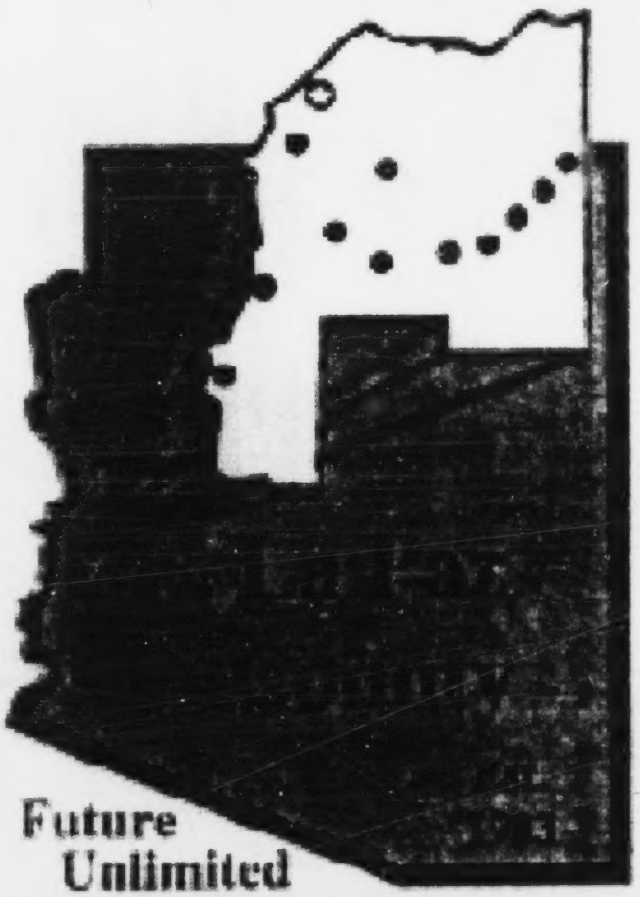
Approved August 1997

Petition - Page 2 of 2

Sheri Newman

Superior Court Clerk

(520) 669-6131
TDD (520) 669-8400
FAX (520) 669-2186



Future
Unlimited

1316 Kofa Avenue, Suite 607
Parker, Arizona 85344

STATE OF ARIZONA
DEPARTMENT OF REAL ESTATE 596368

REAL ESTATE SALESPERSON LICENSE

This is to certify that the person named below has fulfilled the requirements of Arizona laws governing the licensing of
A REAL ESTATE SALESPERSON

This license is effective from February 01, 1999 until the last day of January, 2001

TANYA Z MEYER
CURTIS GRIER
HAVASU REALTY
30 S ACOMA STE 209
LAKE HAVASU CITY, AZ 86403

License No. SA117882000

THIS LICENSE MUST BE AVAILABLE FOR PUBLIC INSPECTION

In Witness Whereof
This 30th day of January, 1999
the Real Estate Commissioner has subscribed his name hereto, and has affixed the seal of his office to this License.

Jerry A. Holl
COMMISSIONER

Document #000043637
Name Change of Doc #9800769

State of California
Commission on Teacher Credentialing
issues this document to

TANYA ZAPPE MEYER

Clear Administrative Services Credential

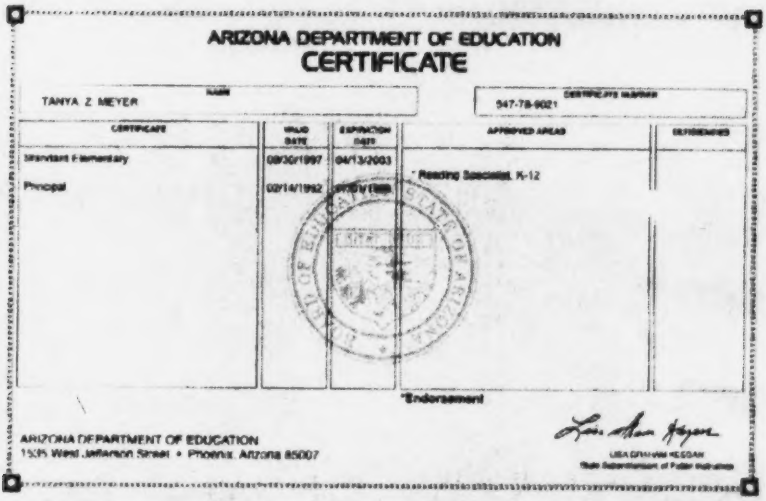
R54 This credential authorizes the holder to serve as a superintendent, associate superintendent, deputy superintendent, principal, assistant principal, supervisor, consultant, coordinator, or an equivalent or intermediate level administrative position in grades twelve and below, including preschool, and in classes organized primarily for adults.

Valid: October 7, 1997 to November 1, 2002

Rnl To renew this credential, the holder needs to submit only an application form and fee to the Commission within six months prior to the expiration date printed above. The renewal period is five years.

* * * * *

E-17



ARIZONA DEPARTMENT OF EDUCATION

CERTIFICATE

NAME: TANYA Z MEYER

CERTIFICATE NUMBER: 547-78-9021

CERTIFICATE	VALID DATE	EXPIRATION DATE	APPROVED AREAS	ENDORSEMENTS
Structural Elementary	08/30/1997	04/13/2003	* Reading Specialist, K-12	
Principal	02/14/1992	07/01/1998		

*Endorsement

ARIZONA DEPARTMENT OF EDUCATION
1535 West Jefferson Street • Phoenix, Arizona 85007

LISA GRAHAM KEEGAN
State Superintendent of Public Instruction

198 P. 1105, 22 Ariz. 490, Horton v. Horton, (Ariz. 1921)

1105 198 P. 1105
22 Ariz. 490
Horton
v.
Horton
No. 1893.
Supreme Court of Arizona.
July 5, 1921

Action by L. J. Horton against Annie Horton, for annulment of marriage. Judgment for plaintiff, and defendant appeals.

Reversed, with directions to dismiss.

1. Divorce k 320

Marriage in foreign state to evade restrictions of state of domicile held not invalid. Where parties domiciled in Arizona went to New Mexico for the purpose of evading the restrictions provided by Civ. Code 1913, par. 3864, as amended by Laws 1917, c. 54, forbidding remarriage for one year after divorce, and were there married, such marriage was not thereby rendered invalid in Arizona, the statute not in terms or by necessary implication declaring such marriage void.

2. Marriage k 3

Marriage valid according to lex loci valid everywhere at common law. Marriage is primarily a contract and under the common-law rule is valid everywhere if entered into according to lex loci.

3. Marriage k 3

Legislature may determine what marriages shall be void, notwithstanding they are valid in state where

celebrated. It is within the power of the legislature to enact what marriages shall be void within the state, notwithstanding they are valid in the state where celebrated, whether contracted between parties who were in good faith domiciled within the state where the ceremony was performed or between parties who left the state for the purpose of avoiding its statutes.

1. DIVORCE 320
   134 ---
   134 VII Operation and Effect of Divorce, and Rights to Divorced Persons
   134k319 Right to Marry
   134k320 In general.

Ariz., 1921
Where parties domiciled in Arizona went to New Mexico for the purpose of evading the restrictions provided by Civ. Code 1913, par 2864, as amended by laws 1917, c. 54 (A.R.S. section 25-320), forbidding remarriage for one year after divorce, and were there married, such marriage was not thereby rendered invalid in Arizona, the statute not in terms or by necessary implication declaring such marriage void.

2. MARRIAGE 3
   253
   253k3 What law governs.

Ariz. 1921
Marriage is primarily a contract and under the common-law rule is valid everywhere if entered into according to the lex loci.

3. MARRIAGE 2
   253 ----
   253k2 Power to regulate and control.

Ariz. 1921

It is within the power of the Legislature to enact what marriages shall be void within the state, notwithstanding they are valid in the state where celebrated, whether contracted between parties who were in good faith domiciled within the state where the ceremony was performed or between parties who left the state for the purpose of avoiding its statutes.

*1106 Appeal from Superior Court, Maricopa County; F. H. Lyman, judge.

Phillips, Cox & Phillips and C. F. Ainsworth, all of Phoenix, for appellant.

Earl Anderson of Phoenix, for appellee.

[22 Ariz. 491] Baker, J.

This action was brought by the plaintiff (the parties will be designated in this court as they were in the court below) to obtain a judgment annulling the marriage between the plaintiff and the defendant, celebrated in Deming, N. M., on the 12th day of September, 1918, on the ground that such marriage was void. It appears from the finding s of the lower court that the parties both resided in the state of Arizona at the time they contracted the marriage in New Mexico, and that they have ever since retained such residence. It further appears that the defendant was formerly married to one William Crawford, but on the 1st day of August, 1918, she was granted an absolute divorce from her husband by the superior court of Maricopa county, Ariz. For the purpose of avoiding the restrictions of the laws of Arizona, prohibiting the marriage of a divorced person until after the expiration of one year from the time the divorce is granted, the parties went to Demin, N. M. and were there married. They immediately returned to this state and lived together as husband and wife until about the 26th day of February, 1920, when the

defendant drove plaintiff from the house, since which time the parties have lived separate and apart.

The lower court determined that the marriage in Deming, N. M., was void and entered a judgment annulling it for the reason and on the ground that such marriage was consummated prior to the expiration of one year from the date of the divorce granted to the defendant.

The provisions of the statutes of this state on the subject are contained in section 3839, Revised Statutes 1913, and section 3864, as amended by chapter 54, Sessions Laws 1917, p. 75:

'3839. All marriages valid by the laws of the place where contracted, shall be valid in this state; [22 Ariz. 492] provided, that all marriages solemnized in any other state or country by parties intending at the time to reside in this state shall have the same legal consequences and effect as if solemnized in this state; parties residing in this state cannot evade any of the provisions of its laws as to marriage by going into another state or country for the solemnization of the marriage ceremony.'

'3864. A divorce from the bonds of matrimony shall not in any wise affect the legitimacy of the children thereof; and either party may, after the dissolution of the marriage, marry again only after one year shall have elapsed from the date of judgment of such divorce; provided however, that if proceedings are begun prior to the expiration of the said one year to set aside said judgment of divorce, or either of them, may not marry again until the said proceedings shall have been determined.'

[1] It is conceded that by the laws of New Mexico the marriage between the parties when consummated there was lawful in that state. Does the fact that the parties, being domiciled in this state, left here and

went to New Mexico for the purpose of evading the restrictions provided in section 3864 and were there married, render such marriage invalid in this state? We do not think so. It will be observed that the statutes above cited do not in terms, or by necessary implication, declare such a marriage void. The statutes merely in general terms prohibit such a marriage. No penalty is affixed for disobedience.

There is some conflict of authority as stated in 5 R.C.L. 1001----

'Upon the question whether the courts of the state which has enacted such a statute merely in general terms prohibiting such marriage of such person occurring out of the state while he is still domiciled within the state. The weight of authority is that if the marriage is valid according to lex loci, it will be upheld even [22 Ariz. 493] by the courts of the state which enacted the statute, and in which theparties to the remarriage are domiciled, even though the parties went out of the state to solemnize the second marriage for the express purpose of evading the law of the domicile and of the forum'

In Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509, the Supreme Court of Massachusetts, in an opinion by Mr. Chief Justice Gray, says:

'A marriage which is prohibited here by statute because contrary to policy of our laws, is yet valid if celebrated elsewhere according to the law of the place, even if the parties are citizens and residents of this commonwealth, and have gone abroad for the purpose of evading our laws, unless the Legislature has clearly enacted that such marriages out of the state shall have no validity here. This has been repeatedly affirmed by well considered decisions.'

And this seems to be the overwhelming weight of the better reasoned cases on the subject. Medway v.

Needham, 16 Mass. 157, 8 AM. Dec. 131; Van Voorhis v. Brintnall, 86 N. Y. 18, 37, 40 Am. Rep. 505; Thorp v. Thorp, 90 N. Y. 602, 43 Am.Rep. 189; Griswold v. Griswold, 23 Colo. App. 365, 129 Pac. 560; Phillips v. Madrid, 83 Me. 205, 22 Atl. 114, 12 L. R. A. 862;, 23 Am. St. Rep. 770 State v. Shattuck, 69 Vt. 403, 38 Atl. 81, 40 L. R. A. 428, 60 Am. St. Rep. 936, and notes; State v. Hand, 87 Nrb. 189, 126 N. W. 1002, 28 L. R. A. (N.S.) 753; Conn *1107 v. Conn, 2 Kan. App. 419, 42 Pac. 1006; Dudley v. Dudley, 151 Iowa, 142, 130 N. W. 785, 32 L. R. A. (N. S.) 1170; Hoagland v. Hoagland (Wyo.) 193 Pac. 843; Hilton v. Stewart, 15 Idaho, 150, 96 Pac. 579, 128 Am. St. Rep. 48.

A number of cases take a contrary view, but an examination of these cases will show that they were based upon statutes expressly declaring the marriages (1) void, or (2) declaring incapacity to contract, [22 Ariz. 94] or (3) which by express terms suspended the operation of decrees of divorce, or were held to suspend it by necessary implication, or (4) such statutes were held to be declarations of public policy, superseding the jus gentium that a marriage valid where performed is valid everywhere. This distinction is pointed out in Griswold v. Griswold, supra. The cases we refer to are collated in 19 C. J. 183, and footnotes, the principal ones being Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N.S.) 804, 128 Am. St. Rep. 1085; Pennegar v. State, 87 Tenn. 244, 10 S. W. 305, 2 L. R. A. 703, 10 Am. St. Rep. 648; McLennan v. McLennan, 31 Or. 480, 50 Pac. 802, 38 L. R. A. 863, 65 Am. St. 835; In re Stul's Estate, 183 Pa. 625, 39 Atl. 16, 39 L. R. A. 539, 63 Am. St. Rep. 776.

[2] Marriage is primarily a contract. In its constitution it is purely personal and consensual. Considered merely as a contract, it is valid everywhere if entered into according to the lex loci. This is the common-law rule. The statute recognizes the common-law rule, 'all marriages valid by the laws

of the place where contracted shall be valid in this state.' The reason for this rule is clearly stated by Mr. Justice Story in his Conflict of Laws (7th Ed.) par. 121, where he quotes from the opinion of Sir Edward Simpson in the historic case of Scrimshire v. Scrimshire, 2 Hagg. Const. 395;

'All civilized nations allow marriage contracts. They are juris gentium, and the subjects of all nations are equally concerned in them. Infinite mischief and confusion must necessarily arise to the subjects of all nations with respect to legitimacy, succession, and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad; and therefore all nations have consented, or are presumed to consent, for the common [22 Ariz. 495] benefit and advantage, that such marriages shall be good or not according to the laws of the country where they are celebrated. By observing this rule few, if any, inconveniences can arise. By disregarding it, infinite mischiefs must ensue.'

[3] The Legislature undoubtedly had the power to enact what marriages shall be void in this state, notwithstanding their validity in the state where celebrated, whether contracted between parties who were in good faith domiciled in the state where the ceremony was performed, or between parties who, being domiciled in this state, left the state for the purpose of avoiding it statutes and married. But the Legislature has not seen fit to do so. If the Legislature in so many words had said that, if persons residing in this state, in order to avoid the restrictions contained in section 3864, and with the intention of returning to reside in this state, go into another state and there have their marriage solemnized, and after return and reside here, their marriage shall be deemed void in this state, and entirely different state of matters would exist.

The decree of divorce granted by the superior court of Maricopa county to the defendant, Annie Horton, was absolute. Essentially it undid the marriage, and those who were united in it were disunited. The prohibition contained in the statute did not render the judgment intermediate or interlocutory, nor did it impair its integrity. She went into another state and there married. The prohibition contained in the statute was without effect outside the territorial limits of this state.

'It is almost universally conceded that statutes prohibiting the guilty party to a judgment of divorce from marrying again, either for a certain period, or while the other party to the former marriage lives, are without effect outside the territorial limits of the prohibiting state. Since such a prohibition is in the [22 Ariz. 496] nature of a penalty it does not apply to divorces granted outside of the state, nor does it carry any disability beyond the borders of the state where in force.' 5 R. C. L. 1004.

In view of all the facts and circumstances disclosed by the record, we are of the opinion that the marriage in New Mexico was not void. While the defendant was forbidden to marry again in this state until after the expiration of one year from the time the divorce was granted, she could contract a marriage in New Mexico which, if valid there, will be recognized by the courts of this state. To hold otherwise would render a number of marriages in this state void, and possibly cast an ugly suspicion upon the legitimacy of innocent children.

*1107_ If our views shall be found inconvenient or repugnant to sound principles, it may be expected that the succeeding Legislature will explicitly enact that marriage contracted within another state by parties who have left this state for the purpose of avoiding its laws, and who return and lie here, shall be of no force in this state.

The judgment of the lower court is reversed, with instructions to dismiss the action.

ROSS, C. J., and McALISTER, J., concur.

397 P.2d 211, 97 Ariz. 98, Roy V. Industrial Commission,
(Ariz. 1964)

*211 397 P.2d 211
97 Ariz. 98
Johnnie May ROY, Petitioner,
v.
The INDUSTRIAL COMMISSION of Arizona and the Howard P. Foley Company and Jelco, Inc. (Foley-Jelco), Respondents.
No. 8212.
Supreme Court of Arizona, In Division.
Dec. 10, 1964.

Certiorari proceeding to review award denying alleged common-law wife death benefits under the workmen's compensation law. The Supreme Court, Udall, C. J., held that common-law marriage was valid under law of Texas, and where presumption that marriage continued until decedent's death was not rebutted by evidence in record the presumption that marriage continued until decedent's death was not rebutted by evidence in record the presumption controlled and sufficed as basis on which predicate award of death benefits to her.

Award set aside.

1. MARRIAGE 51
253 ----
253k51 Questions for jury.

Ariz. 1964

Under Texas law, question whether a common-law marriage exists is a legal question.

2. MARRIAGE 13
253 ----
253K12 essentials
253K13 common-law REQUISITES.

Ariz. 1964
Under Texas law, requisites of a common-law marriage are express or implied agreement between parties to become husband and wife, cohabitation in pursuance of such agreement, and holding out by parties that they are husband and wife.

3. MARRIAGE 40(1)
253
253k40 Presumptions
253k40(1) In general.

Ariz. 1964
When a showing is made that a marriage has been celebrated, every act necessary to validity of that marriage will be presumed in absence of proof to the contrary.

4 MARRIAGE 40(10)
253 ----
253k40 Presumptions
253k40(10) Rebuttal of presumptions.

Ariz. 1964
Evidence to rebut validity of a marriage must be sufficiently clear and conclusive as fairly to preclude any other result.

5 MARRIAGE 40(10)
253 ---
253K40 Presumptions
253K40(10) Rebuttal of presumptions.

Ariz. 1964
While presumption of marriage is very powerful, evidence in opposition to presumption need not be conclusive to overcome it.

6. WORKERS' COMPENSATION 1474
413 ----
413XVI Proceeding to Secure Compensation
413XVI(N) Weight and Sufficiency of Evidence
413XVI(N)6 Dependency and Relationship
413K1472 Husband and Wife
413K1474 Existence and validity of marriage relations; common-law marriages.
Ariz. 1964
Where facts gave rise to inescapable legal conclusion that common-law marriage of alleged common-law wife and decedent was valid under law of Texas, and strong presumption that marriage continued was not rebutted, presumption that marriage continued until decedent's death controlled and sufficed as base on which to predicate award of death benefits under workmen's compensation law to widow.

*212 Joe H. Tonahill, Jasper, Tex., Kenneth S. Scoville and LeRoy Hofmann, Phoenix, for Johnnie May Roy

[97 Ariz. 99] Edgar M. Delaney, Phoenix, for respondent Industrial Commission of Arizona; Richard J. Daniels, Frank E. Murphy, Jr., James S. Tegart, Robert A. Slonake, Ralph E. Mahowald, Jr., Phoenix, of counsel.

UDALL, Chief Justice.

Petitioner, Johnnie Mae (Reeves) Roy, brings this matter before us by means of certiorari to review an award of the Industrial Commission denying her death benefits under the Workmen's Compensation Law. Her claim arises out of the death of Harold Lee

Roy, to whom it is alleged she was married at the time of his demise.

No issue is raised regarding the death of Harold Lee Roy being the proximate result of an accidental injury sustained in the course of and arising out of his employment. Decedent was a lineman working for Foley-Jelco Company and was killed almost instantaneously May 9, 1962, while working on the construction of an electrical transmission line tower.

The only dispute involved herein lies in the marital status of decedent and petitioner. Petitioner alleges she and decedent consummated a common law marriage in Texas in the latter part of 1959 or early 1960, and it is admitted that such a marriage is entirely legal in that state. A thorough interstate investigation of this matter was conducted by the Industrial Commission which was assisted in its endeavors by counsel representing two children of the deceased. The children were issue of two previous marriages previously entered into and dissolved in accordance with the prescribed solemnities. Having been born under such circumstances their rights as surviving dependents of decedent have been recognized.

The sole question for our determination is whether the conclusion of the Industrial Commission, that petitioner was not the lawful wife of decedent at the time of his death, is sustained by competent evidence in the record.

*213 [1] [2] Although our statutes require the solemnization of marriages contracted within our state, A.R.S. section 25-111, they specifically provide for recognition of the validity of marriages valid by the laws of the place where contracted, A. R. S. section 25-112. It therefore must be determined whether under Texas law petitioner and the deceased achieved the marriage status. Respondent

concluded that such a status had not been reached and accordingly denied petitioner's claim for death benefits.

Whether a common-law marriage exists has been held by the Texas courts to be a legal question. Moore b. Jordan, 328 S. W. 2.d 343 (Tex.Civ.App.). The requisites of such a marriage are: (1) An agreement express or implied between the parties to become husband and wife; (2) cohabitation [97 Ariz. 100] in pursuance of such agreement, and (3) a holding out by the parties that they are husband and wife. Ex Parte Threet, 160 Tex. 482, 333 S. W. 2d 361; Shelton v. Belknap, 155 Tex. 37, 282 S. W. 2d 682

[3] [4] [5] A number of years ago this Court had occasion to deal with the presumption of the validity of marriage and stated:

'Both the law and public policy favor matrimony and when it is once shown that a marriage has been celebrated, the contract, the parties' capacity to enter into it, and in fact every act necessary to it validity will be presumed, in the absence of proof to the contrary. The presumption that it was legal and valid in all respects is one of the strongest known to the law, * * *.' Kolombatovich v. Magma Copper Co., 43 Ariz. 314, 318, 30 P.2d 832, 834.

It was pointed out in the Kolombatovich decision, supra, that the evidence to rebut the validity of the marriage must be sufficiently clear and conclusive as fairly to preclude any other result. A more recent decision recognizes the presumption as being very powerful but rejected the argument that the evidence in opposition thereto must be conclusive to overcome it. Hodges v. Industrial Commission, 73 Ariz. 326, 241 P.2d 431. See also Texas Employers' Insurance Association v. Elder, 155 Tex. 27, 282 S. W. 2d 371.

As the only issue involved herein is the question of whether petitioner and decedent were married we must look to the record to determine whether the evidence before respondent was sufficient to establish a prima facie case of such marriage, thereby giving rise to the presumption of its validity.

[6] The record herein indicates that early in the investigation of this matter respondent secured and had before it for consideration a certified copy of the death certificate which contains the information that decedent was married at the time of his death and petitioner's name as spouse. It indicates that decedent's brother Ivey signed as informant

Upon rehearing of this matte by the respondent the testimony of seven witnesses was taken. The petitioner testified in essence that she and decedent visited a Justice of the Peace in Orange, Texas, intending to have a ceremonial marriage. Although she was unsure of the exact date she thought it was on or about March 18m 1960. They were informed that a three day waiting period was necessary. Upon further inquiry the Justice of the Peace informed them of the legality of so-called common-law marriages and they then agreed to be married in that manner. Decedent on that day place on petitioner's finger a wedding band which she wore until Christmas of 1961 when decedent gave [97 Ariz. 101] her a set of rings consisting of both an engagement and wedding ring.

On the day they entered into this agreement they had occasion to be an establishment in Buna, Texas, owned by a friend of decedent, Anthony Scalisi. Mr Scalisi testified that he recalled the visit and that decedent told him they had been married that day. He further corroborated petitioner's claim that from that day forward they held themselves out to the public generally as husband and wife. He also had occasion to visit them while they were *214. staying

at decedent's father's home in Livingston, Texas, where they presented themselves as husband and wife; and it was not until after decedent's death that he learned they had not been ceremonially joined in matrimony.

The secretary of the union local in Beaumont, Texas, of which decedent was a member during 1960 and 1961, testified that during this period the couple held themselves as husband and wife; and, it was not until after decedent's death that he learned they had not been ceremonially joined in matrimony.

The secretary of the union local in Beaumont, Texas, of which decedent was a member during 1960 and 1961, testified that during this period the couple held themselves out to the public generally as husband and wife.

Decedent's brother Emory testified that when visiting his home in Erath, Louisiana, the couple slept together and otherwise conducted themselves as husband and wife. Three other witnesses testified: one of the decedent's ex-wives; a former co-worker of petitioner; and a former co-worker of decedent. In summation it can be said that their testimony, along with that of Emory, indicated that all was not blissful between the parties, that decedent drank quite heavily and on several occasions physically beat the petitioner. She apparently threatened to leave after these incidents and stated that she and the decedent were not married; however, these statements could not change the past and if in fact a valid marriage had been entered into they could not destroy its validity.

The evidence indicates that this couple resided together as husband and wife in approximately twelve communities located in Texas, Louisiana, Kansas, New Mexico, and Arizona. This is certainly consistent with a marriage relationship.

Decedent's brother Ivey did not testify; however, in addition to being informant for the death certificate he submitted two affidavits. In the first one he reiterated the fact that they were married but in the second he repudiates the first to some extent.

Respondent's investigation disclosed that on August 22, 1960, decedent applied for credit in Erath, Louisiana, listing petitioner as his wife, and again, February 9, 1962, he obtained a loan for the purchase of an automobile in Mesa, Arizona, listing petitioner as his spouse. It is also unrefuted in the record that petitioner was paid as surviving spouse on a life insurance policy taken through the labor union.

It is our opinion that the above facts give rise to the inescapable legal conclusion that under the law of Texas a valid common-law [97 Ariz. 102] marriage between petitioner and decedent was consummated. Once established there is a strong presumption that the marriage continued, and this record does not contain sufficient evidence to rebut it. Therefore, the presumption is controlling and sufficient upon which to predicate an award. Respondent was bound thereby, and must give it effect. See Martin v. Industrial Commission, 73 Ariz. 401, 242 P.2d 286.

Award set aside.

LOCKWOOD, V. C. J., SCRUGGS, J., concurring.

418 F. Supp. 1061
(Cite as: 418 F.Supp.1061)

Roger G. Redhail et al., Plaintiffs,

v.

Thomas E. ZABLOCKI et al., Defendants.

Civ. A. No. 74-C-624.

United States District Court, E. D. Wisconsin

Aug. 31, 1976

A class action was brought, under federal civil rights statute proscribing the deprivation of rights, and against defendant class of county clerks, challenging constitutionality of statute which requires residents, who have minor issue not in their custody whom they are under an obligation to support by a court order or judgment, to obtain a court order granting them permission to marry in order to obtain a marriage license. A declaratory judgment and an injunction were sought. The three-judge District Court, Reynold, J., held that action was entitled to be maintained as a class action against class of defendants consisting of 72 county clerks; that no pre judgment notice to class members was required; and that statute is invalid as violative of equal protection.

Order accordingly.

[1] DECLARATORY JUDGMENT 123
118Ak123
In the absence of a pending state criminal prosecution, both declaratory judgments and injunctions may be issued by federal court with respect to constitutionality of state statute.

[1] INJUNCTION 105(2)
212k105(2)
In the absence of a pending state criminal prosecution, both declaratory judgments and injunctions may be issued by federal court with respect to constitutionality of state statute.

[2] CIVIL RIGHTS 209
78k209
Formerly 78k13.9
Exhaustion of state remedies is not a prerequisite to commencing an action under federal civil rights statute proscribing the deprivation of rights. 42 U.S.C.A. section 1983.

[3] FEDERAL CIVIL PROCEDURE 181

170 Ak181
Action, brought under federal civil rights statute, challenging constitutionality of state statute requiring certain residents to obtain court permission before they can marry was entitled to be maintained as a class action against class of defendants consisting of 72 county clerks. Fed.Rules Civ.Proc. rule 23 (a), (a)(1, 3, 4), (b), , (b)(2), 28 U.S.C.A.; W.S.A. 245.10(1).

[4] CONSTITUTIONAL LAW 309(1.5)
92k309(1.5)
Formerly 92k309(1)
Due process does not require notice to absent members of a class within rule 23(b)(2). Fed.RulesCiv.Proc. rules 23(d)(2), 28 U.S.C.A.

[5] CONSTITUTIONAL LAW 48(4.1)
92k48(4.1)
Formerly 92k48(4)
The discretionary notice provisions of class action rule 23(d)(2) are at least presumptively valid as complying with due process. Fed.Rules Civ.Proc.rule 23(d)(2), 28 U.S.C.A.

[6] CONSTITUTIONAL LAW 309(1)
92k309(1)
Due Process requires only that "interested parties" be given notice.

[7] CONSTITUTIONAL LAW 309(1.5)
92k309(1.5)
Formerly 92k309(1)
In class action, brought under federal civil rights statute, challenging constitutionality of state statute which requires certain residents to obtain court permission before they can marry, brought against defendant class of county clerks, all of whom were required by state statute to refuse to issue marriage licenses to members of class of plaintiffs without

court order, no pre judgment notice to members of either class was required by either rule 23 or due process; however, notice of judgment would be provided to members of defendant class. Fed.Rules.Civ.Proc. rule 23(d)(2), 28 U.S.C.A.; W.S.A. 245.10(1, 4, 5).

[7] FEDERAL CIVIL PROCEDURE 177.1
170Ak177.1
Formerly 170Ak177, 170 Ak161
In class action, brought under federal civil right statute, challenging constitutionality of state statute which requires certain residents to obtain court permission before they can marry, brought against defendant class of county clerks, all of whom were required by state statute to refuse to issue marriage licenses to members of class of plaintiffs without court order, no pre judgment notice to members of either class was required by either rule 23 or due process; however, notice of judgment would be provided to members of defendant class. Fed.RulesCiv.Proc. rule 23(d)(2), 28 U.S.C.A.; W.S.A. 245.10(1, 4, 5).

[8] CONSTITUTIONAL LAW 208(1)
92k208(1)
Statutory classifications are generally measured against the rational relationship test and are upheld if they are rationally related to some legitimate government interest. U.S.C.A.Const. Amend. 14.

[9] CONSTITUTIONAL LAW 208(1)
92K208(1)
If statutory classification impinges upon fundamental rights or constitutes a suspect classification, it is subjected to strict scrutiny and can be upheld only if it is necessary to promote compelling governmental interests and is narrowly drawn to express only such interests. U.S.C.A. Const. Amend. 14.

[10] CONSTITUTIONAL LAW 82(10)

92k82
Individual interests involved in marriage are within the constitutional right of privacy.

[11] CONSTITUTIONAL LAW 82(10)
92k82(10)
Formerly 92k82
There is a constitutionally protected right to marry which occupies status of a fundamental right.

[12] DIVORCE 34
134k34
Classification created by statute placed substantial burdens on ability of class members to marry and thus affected their fundamental rights and was required to be subjected to strict scrutiny. W.S.A. 245.10(1,4,5).

[13] DIVORCE 34
134k34
Wealth discrimination inherent in statute requiring certain residents to obtain permission before they can marry provided additional justification for applying strict scrutiny test.

[14] CONSTITUTIONAL LAW 225.1
92k225.1

A sliding scale equal protection analysis was not appropriate in case involving validity of state statute which requires certain residents to obtain court permission before they can marry. W.S.A. 245.10(1,4,5); U.S.C.A. Const.Amend. 14

[15] CONSTITUTIONAL LAW 208(1)
92k208(1)
Where a statutory classification is tested against requirements of strict scrutiny test, state bears burden of showing how compelling its interest may be.

[16] DIVORCE 321
134k321
State's interest in counseling persons who had failed to fulfill support obligations arising from a previous marriage was insufficient to justify restriction on such persons' marital rights under statute which prohibits remarriage without court permission. W.S.A. 245.10(1,4,5).

[17] DIVORCE 321
134k321
Interest in state in safeguarding welfare of children could not justify restriction on rights of persons under statute which prohibits marriage without court permission, since statute was not necessary to achievement of such interest. W.S.A. 245.10(1,4,5)

[18 DIVORCE 321
134k321
State has legitimate and substantial interests in regulating the domestic relations of its residents.

[19] CONSTITUTIONAL LAW 225.1
92k225.1
Formerly 92k225.2
Statute which requires residents, who have minor issue not in their custody whom they are under an obligation to support by a court order or judgment, to obtain a court order granting them permission to marry in order to obtain a marriage license is invalid as violative of equal protection. W.S.A. 245.10(1,4,5); U.S.C.A. Const. Amend. 14.

[19] DIVORCE 4
134k4
Statute which requires residents, who have minor issue not in their custody whom they are under an obligation to support by a court order or judgment, to obtain a court order granting them permission to marry in order to obtain a marriage license is invalid

as violative of equal protection. W.S.A. 245.10(1,4,5); U.S.C.A. Const. Amend. 14.
*1062 Georgia Lutze, Paticia Nelson and Robert H. Blondis, Milwaukee Legal services, Inc., Milwaukee, Wis., for plaintiffs.

Robert P. Russel, Corp. Counsel, and David J. Siler, Asst. Corp. Counsel, Milwaukee, Wis., for defendants.

Before TONE, Circuit Judge, and REYNOLDS and Warren, District Judges.

REYNOLDS, District Judge.

This is a class action challenging the constitutionality of a Wisconsin statute, s 245.10(1), (4), and (5) (1973), [FN1] which requires certain residents to obtain court permission before they can marry. The action is brought pursuant to 42 U.S.C. s 1983, and *1063 jurisdiction is conferred by 28 U.S.C. s 1343(3). Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 822 (1972). The statute is attacked on the grounds that it conflicts with rights secured by the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. The relief sought includes a declaratory judgment that the statute is unconstitutional as well as an injunction restraining it enforcement. We hold that the statute violates the Fourteenth Amendment's equal protection clause and that the relief requested should be granted.

FN1. "245.10 Permission of court required for certain marriages (1) No Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of either the court of this state which granted such judgment or support order, or the court having divorce jurisdiction in the county of

this state where such minor issue resides or where the marriage license application is made. No marriage license shall be issued to any such person except upon court order. The court, within 5 days after such permission is sought by verified petition in a special proceeding, shall direct a court hearing to be held in the matter to allow said person to submit proof of his compliance with such prior court obligation. No such order shall be granted, or hearing held, unless both parties to the intended marriage appear, and unless the person, agency, institution, welfare department or other entity having the legal or actual custody of such minor issue is given notice of such proceeding by personal service of a copy of the petition at least 5 days prior to the hearing, except that such appearance or notice may be waived by the court upon good cause shown, and, if the minor issue were of a prior marriage, unless a 5-day notice thereof is given to the family court commissioner of the county where such permission is sought, who shall attend such hearing, except that such appearance or notice may be waived by the court upon good cause shown, an if the minor issue were of a prior marriage, unless a 5 day notice thereof is given to the family court commissioner of the county where such permission is sought, who shall attend such hearing, and to the family court commissioner of the court which granted such divorce judgment. If the divorce judgment was granted in a foreign court, service shall be made on the clerk of that court. Upon the hearing, if said person submits such proff and makes a showing that such children are not then and are not likely thereafter to become public charges, the court shall grant such order, a copy of which shall be filed in any prior proceeding under s. 52.37 or divorce action of such person in this state affected thereby;otherwise permission for a license shall be withheld until such proof is submitted and such showing is made, but any court order withholding such permission is an appealable order. Any hearing under this section

may be waived by the court if the court is satisfied from an examination of the court records in the case and the family support records in the office of the clerk of court as well as from disclosure by said person of his financial resources that the latter has complied with prior court orders or judgments affecting his minor children, an also has shown that such children are not then and are not likely thereafter to become public charges. No county clerk in this state shall issue such license to any person required to comply with this section unless a certified copy of a court order permitting such marriage is filed with said county clerk."(4) If a Wisconsin resident having such support obligations of a minor, as stated in sub. (1), wishes to marry in another state, he must, prior to such marriage, obtain permission of the court under sub. (1), except that in a hearing ordered or held by the court, the other party to the proposed marriage, if domiciled in another state, need not be present at the hearing, the judge shall within 5 days, send a copy of the order of permission to marry, stating the obligations of support, to such part not present. (5) This section shall have extraterritorial effect outside the state; and s. 245.04(1) and (2) are applicable hereto. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere.

I.

In January of 1972, a paternity action was commenced in the County Court, Civil Division, of Milwaukee County, Wisconsin, against plaintiff Roger G. Redhail in which it was alleged that he was the father of a baby girl born out of wedlock on July 5, 1971. On February 23, 1972, Redhail appeared and admitted that he was the father of the child. On May 12, 1972, Redhail was adjudged the father of the child born on July 5,1971, and was ordered to pay $109 per month as support for the child until she

reached eighteen years of age, and was also ordered to pay court costs.

At the time of his admission of paternity, Redhail was a minor and a high school student. From May of 1972 until August of 1974, he was unemployed, indigent, and unable to pay any support obligation. No payments were, therefore, made, and as of December 24, 1974, there was an arrearage in excess of $3,732.

Redhail's child has been a public charge since her birth and is currently receiving benefits under the Aid to Families with Dependent Children ("AFDC") program in excess of $109 per month. Thus, the child would be a public charge even if Redhail were current I the payment of support in the paternity action.

On September 27, 1974, Redhail filed an application for a marriage license with defendant *1064 Thomas E. Zablocki. Zablocki is the County Clerk of Milwaukee County and is responsible for the issuance of marriage licenses in Milwaukee County pursuant to s 245.05, Wis.Stat. On September 30, 1974, an agent of Zablocki denied Redhail's application for a marriage license and refused to issue a marriage license solely because Redhail failed to comply with s 245.10(1), Wis.Stats., in that he did not have a court order granting him permission to marry.

This complaint in this action was filed on December 24, 1974. Since a permanent injunction restraining the enforcement of a state statute was requested the action was one requiring a three-judge district court, 28 U.S.C. s 2281. Designation of a three-judge court was requested, and on January 6, 1975, the Chief Judge of the Seventh Circuit entered an order designating this three-judge court pursuant to 28 U.S.C. s 2284. Defendant subsequently filed his

answer. Notice was given to the governor and the attorney general pursuant to 28 U.S.C. s 2284 (2).

On February 18, 1975, plaintiff filed a motion for a class action. The motion sought to have the action maintained as a class action on behalf of all Wisconsin residents subject to the provisions of s 245.10(1) and against a class consisting of all the county clerks within Wisconsin. By order dated February 20, 1975, Judge Reynolds ordered that the action proceed as a class action pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure, on behalf of a class of plaintiffs defined as follows:

'All Wisconsin residents who have minor issue not in their custody and who are under an obligation to support such minor issue by any court order or judgment and to whom the county clerk has refused to issue a marriage license without a court order, pursuant to s 245.01(1), Wis.Stats.(1971)."

The order also established a briefing schedule in the event plaintiffs desired to maintain the action against a class consisting of all the county clerks. While plaintiffs filed a brief in support of the motion, defendant Zablocki has never filed a brief in opposition.

Following the filing of a stipulation of facts and briefs, oral argument was held on June 23, 1975, in which a representative from the Wisconsin attorney general's office participated. The Court requested the parties to discuss the applicability of Huffman v Pursue, Lt.., 420 U.S. 592, 95 S. Ct. 1200, 43 L. Ed.2d 482 (1975), and plaintiffs later filed a memorandum on this issue.

II.

Before reaching the merits, it is necessary to discuss the Huffman issue as well as to decide whether the action should be maintained against a class of

defendants consisting of all the county clerks in the State of Wisconsin.

A.

In Younger v. Harris, 401 U. S. 37, 91 S.Ct. 746, 27 L.Ed. ed 669 (1971), the Court held that federal courts must refrain from granting injunctions which would interfere with pending state criminal proceedings in the absence of extraordinary circumstances such as when there is a showing of "bad faith" or harassment" by the state officials responsible for the prosecution, supra at 54, 91 S. Ct, 746, or where the state law to be applied is " 'flagrantly and patently violative of express constitutional prohibitions,'" supra at 53, 91 S.Ct. at 755, In a companion case, Samuels v. Mackell, 401 U.S. 66, 91 S. Ct. 764, 27 L. Ed.2d 688 (1971), the same abstention doctrine was held to apply to granting declaratory judgments. [FN2]

FN2. Companion cases to Younger and Samuels were: Boyle v. Landry, 401 U.S. 77, 91 S. Ct. 758, 27 L.Ed.2d 696 (1971); Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971); Dyson v. Stein, 401 U.S. 200, 91 S.Ct. 769, 27 L.Ed.2d 781 (1971); Byrne v. Karalexis, 401 U.S. 216, 91 S. Ct. 777, 27 L. Ed.2d 792 (1971).

Huffman v. Pursue, Ltd., supra, extended Younger to a situation where the state court action, although nominally civil rather *1065 than criminal, was "in important respects *** more akin to a criminal prosecution than are most civil cases. The State is a party *** and the proceeding is both in aid of an closely related to criminal statutes which prohibit the dissemination of obscene materials. ***"Supra 420 U.S. at 604, 95 S. Ct at 1208. Huffman also held that the federal plaintiff who has lost at the state court trial "must exhaust his state appellate remedies before seeking relief in the District Court, unless he can

bring himself within one of the exceptions specified in Younger." Supra 420 U.S. at 608, 95 S. Ct. at 1210. The Court did not, however, decide whether Younger applies to any type of state court proceeding. Supra at 607, 95 S. Ct. at 1200.

[1] In the circumstances of this action, it is unnecessary to decide whether Younger should be further extended. Plaintiff Redhail did not petition a state court for permission to marry under the provisions of s 245.10(1) after he was denied a marriage license. There is, therefore no pending state proceeding which would be frustrated by granting the relief requested. In the absence of pending state criminal prosecution, both declaratory judgments and injunctions may be issued. Steffel v. Thompson, 415 U. S. 452, 94 S. Ct. 1209, 49 L.Ed.2d 505 (1974); Doran Salem Inn, Inc., 422 U.S. 922, 95 S. Ct. 2561, 45 L.Ed.2d 648 (1975). Thus, even assuming that Younger should be held to apply to any type of state court proceeding, since plaintiff Redhail never initiated a proceeding under s 245.10(1), there is no threat to the principle underlying Younger and Samuels *** that state courts are fully competent to adjudicate constitutional claims ***." Doran v. Salem Inn, Inc., supra, at 930, 95 S. Ct. at 2567.

[2] Nor is there any requirements that a federal plaintiff in an action under 42 U.S.C. s 1983, such as Redhail, first apply to state courts for relief. Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L.Ed.2d 492 (1961), established the principle that exhaustion of state remedies is not a prerequisite to commencing a s 1983 action. See also, Wilwording v. Swenson, 404 U.S. 249, 92 S. Ct 407, 30 L.Ed.2d 418 (1971); McNeese v. Board of Education, 373 U.S. 668, 83 S. Ct. 1433, 10 L.Ed.2d 622 (1961).

There is, therefore, no barrier to consideration of plaintiffs' claims on the merits even if the principles

of Younger and Huffman are held to apply to any state court proceeding. [FN3]

FN3. There may be members of the plaintiff class who have applied to state courts for permission to marry and whose petitions may be said to be "pending" in those courts. But since the relief requested is prospective in nature and operates against county clerks rather than judges, granting the plaintiff class relief will not occasion "interference" with state court proceedings.

B.

Plaintiffs seek to have this action maintained as a class action as to defendants under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The defenant class is defined in the complaint as "all county clerks of counties within the State of Wisconsin, all of whom are required by s 245.10(1) Wis.Stats. (1971) to refuse to issue marriage licenses to members of the class of plaintiffs without a court order." As stated above, defendant Zablocki has not filed a brief indicating why this action should not be allowed to proceed against a class of defendants.

Rule 23(a) prescribes the essential prerequisites that must be satisfied for any class action. They are satisfied here. First, the class of defendants, consisting of the seventy-two county clerks in Wisconsin, is "so numerous that joinder of all members is impracticable." Rule 23(a)(1). Next, there is a question of law common to all the members of the class the constitutionality of the challenged statute. Thirdly, the claims and defenses of the representative party, defendant Zablocki, are "typical of the claims or defenses of the class," Rule 23(a)(3), since Zablocki's contention that his action in refusing a marriage license to Redhail was justified by the statute would undoubtedly be asserted by the other county clerks. Finally, defendant Zablocki is a

*1066 representative party who "will fairly and adequately protect the interests of the class." Rule 23(a)(4). Not only is defendant Zablocki's interest identical to that of the other county clerks, but the attorney representing him is from the Milwaukee County Corporation Counsel's office which is experienced in conducting federal litigation. Furthermore, the Attorney General of Wisconsin has taken an active part in this action, urging that the challenged statute be upheld.

Besides fulfilling the prerequisites of Rule 23(a), a class action must fit within one of the three types of class actions established by Rule 23(b). Plaintiffs seek to have the action proceed under Rule 23(b)(2):

"(T)he party opposing the class has acted or refused to act on the ground generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; ***."

[3] A Rule 23(b)(2) class action is particularly appropriate in civil rights cases, although the rule is not so limited. 3B Moore's Federal Practice P 23.40, at 23-654 (2d ed. 1974); C. Wright, Law of Federal Courts, s 72, at 312 (2d ed. 1970); Advisory Committee's Note to 1966 Amendment, 39 F.R.D. 102 (1966). While the language of Rule 23(b)(2) does not expressly provide for its use where declaratory or injunctive relief is sought against a class, such class actions have been ordered. Danforth v. Christian, 351 F.Supp. 287 (W.D.Mo. 1972); Rakes v. Coleman, 318 F.Supp. 181 (E.D.Va. 1970); Washington v. Lee, 263 F. Supp. 327 (M.D.Ala.1966), aff'd sub nom. Lee v. Washington, 390 U.S. 333, 88 S. Ct. 994, 19 L.Ed.2d 1212 (1968). See, 3B Moore's Federal Practice P 23.40, 1974 Supplement, at 86. Where as here, a statute with statewide application is challenged on the ground of its unconstitutionality allowing the action to proceed against the class of officials charged with its enforcement is in accordance with

the interest of judicial administration and justice which Rule 23 is meant to further.

At oral argument, it was pointed out that the members of the defendant class of county clerks have never been given notice of the pendency of this action. Indeed, no notice, either individual or otherwise, has been directed at the members of the plaintiff class. Rule 23 itself does not require notice to the members of a (b)(2) class, since the mandatory notice provisions of Rule 23 (c)(2) are by their terms applicable, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 n. 14, 94 S. Ct. 2140, 40 L.Ed.2d 732 (1974), and the notice provision of Rule 23(d)(2) is discretionary with the Court. Advisory Committee's Note to 1966 Amendment, 39 F.R.D. 106. The question thus presented is whether due process requires notice to the absent members of a (b)(2) class.

On this question there exists a split of authority, Some courts have ruled that due process requires notice to the members of a (b)(2) class if the judgment is to be binding on the. See, e.g., Zeilstra v. Tarr, 466 F. 2d 111 (6th Cir. 1972); Schrader v. Selective Service System Local Board No. 76 Wisconsin, 470 F.2d 73 (7th Cir.), cert. denied, 409 U.S. 1085, 93 S. Ct. 689, 34 L.Ed.2d 672 (1972); [FN3a] Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968), on remand, 52 F.R.D. 253 (S.D.N.1971); 54 F.R.D. 565 (S.D.N.Y.1972); reversed, 479 F.2d 1005 (2nd Cir. 1973); vacated and remanded, 417 U.S. 156, 94 S. Ct. 2140, 40 L.Ed.2d 732 (1974); Pasquier v. Tarr, 318 F. Supp. 1350 (E.D.La. 1970), aff'd, 444 F.2d 116 (5th Cir. 1971). Other courts have held that no notice need be given to the class members because due process is satisfied when the class is adequately represented by counsel. See, e.g., Hammond v. Powell, 462 F.2d 1053 (4th Cir. 1972); Yaffe v. Powrs, 454 F. 2d 1362 (1st Cir. 1972); Lund v. Affleck, 388 F.Supp. 137

(D.R.I.1975); White v. Local No.207 of Laborer's Intl. Union, 387 F.Supp. 53(W.D.La. 1974); Mazer v. Weinberger, 385 *1067 F. Supp. 1321 (E.D.Pa.1974); Souza v. Scalone, 64 F.R.D. 654 (N.D. Calif. 1974); American Finance System, Inc. v. Harlow, 65 F.R.D. 94 (D.Md.1972); Watson v. Harlow, 65 F.R.D. 94 (D.Md. 1972); Watson v. Branch County Bank, 380 F. Supp. 945 (W.D.Mich.1974); Lynch v. Household Finance Corp., 360 F. Supp. 720 (D. Conn. 1973); Hooks v. Wainwright, 352 F.Supp. 163 (M.D.Fla.1972). The commentators have been critical of the line of cases requiring notice to (b)(2) class members. 3B Moore's Federal Practice P 23.55, at 23-1132 23-1153; 7A Wright and Miller, Federal Practice and Procedure, s 1786, 1793, at 142-144, 203-205; Miller, "Problems of Giving Notice in Class Actions." 1973, 58 F.R.D. 313, 313-316.

FN3a. The Seventh Circuit has stated that in light of n. 14 in Eisen, 417 U.S. at 177, 94 S.Ct. 2140, the holding in Schrade "will presumably have to be reexamined at an appropriate time." Bijeol v. Benson, 513 F.2d 965, 968 n.3 (7th Cir. 1975).

[4][5][6] The most extensive treatment of the problem is by Chief Judge Fox in Watson v. Branch County Bank, supra, at 956-960. We are in general agreement with the conclusions stated therein. An ironclad rule requiring individual notice to members of a (b)(2) class would significantly frustrate use of (b)(2) class actions. It has been pointed out that when members of a (b)(2) class are in the role of plaintiffs, notice would not serve a useful purpose since members of such a class may not "opt out" and thereby prevent an adjudication of their legal interests. Air Line Stewards and Stewardesses Assn., Local 550 v. American Airline, Inc., 490 F.2d 636, 642 (7th Cir. 1973), cert. denied, 416 U.S. 993, 94 S.Ct. 2406, 40 L.Ed.2d 773(1974). Furthermore, where the (b)(2) class includes a large number of persons whose identities and whereabouts are unknown,

individually mailed notices may well be impossible and notice by publication similarly futile. While we are mindful of the Court's statement in Eisen v. Carlisle & Jacquelin. 417 U.S. 156, 176, 94 S. Ct. 2140, 2152, 40 L.Ed.2d 732 (1974), that "(t)here is noting in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs, "imposition of a notice requirement can be tailored to fit the pocketbook of particular plaintiffs," imposition of a notice requirement on)b)(2) class actions as a matter of due process should be avoided since "the named plaintiffs in class actions raising broad constitutional or statutory questions simply cannot afford to pay for notice to absent class members, and (such) a requirement *** prevents the suit from being maintained as a class action." Watson v. Branch County Bank, 380 F.Supp. 945, 959 (W.D.Mich.1974). We agree with Chief Judge Fox that the discretionary notice provisions of Rule 23 (d)(2) are at least presumptively valid as complying with due process, which must be tailored to the "character of the proceedings and the nature of the interests *** involved***." Mullane v. Central Hanover Bank and Trust Co., Trustee, 339 U. S. 306, 317, 70 S. Ct. 652, 659, 94 L.Ed. 865 (1950), [FN3b]

FN3b. Due process requires only that "interested parties" be given notice. Mullane v. Central Hanover Bank and Trust Co., Trustee, supra, 339 U.S. at 314, 70 S.Ct.652. We doubt that the members of the defendant class are interested persons in any realistic sense. While the state cannot involuntarily be made a party because of it sovereign immunity, and the plaintiff's rights can be asserted only against the agents of the state under the authority of Ex parteYoung, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed 714 (1908), it is the state's interest, not that of the county clerks, that is in reality involved. The state's interest is represented and protected by it chief legal officer, the Attorney General of Wisconsin, who represents the named defendant and

who would also be representing the other members of the defendant class whether or not notice is given.

If the suit had been brought against the state (following a valid Eleventh Amendment waiver), only notice to the state itself would have been required, yet the injunction could still have run against the individual county clerks as agents of the state. See Fed.R.Civ.P. 65(d); Harrington v. Colquitt Country Board of Education, 449 F.2d 161 (5th Cir. 1971) (per curiam). Their interest I the suit is not greater in the instant case, and their due process rights should also be no greater.

[7] The remaining question is, therefore, whether there are special circumstances in this action which require notice to the members of either the plaintiff or defendant class. Rule 23(d)(2) sets forth a list of the special circumstances which might require notice:

"In the conduct of actions to which this rule applies, the court may make appropriate orders: *** (2) requiring, for the protection of the members of the *1068 class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defense, or otherwise to come into the action; ***."

*1069 The effects of the statute on plaintiff Redhail should be carefully noted. He is unable to marry anywhere without a court order so long as he maintains his Wisconsin residency. Were he to petition a court for permission to marry, the court would have to deny the petition since Redhail's indigency has made it impossible for him to satisfy the support obligation ordered in the paternity action. Furthermore, even if he could somehow pay the arrearage, because his child receives AFDC

benefits in excess of the $109 per month support obligation, the child would still be a public charge.

In determining whether the classification created by the statute complies with the requirements of equal protection, it is necessary to first decide what intensity of scrutiny it must be subjected to and then to examine the interests arguably furthered by the statute.

B.

[8][9] Under the equal protection approach currently utilized by the Court, statutory classifications utilized by the Court, statutory classifications are generally measured against the rational relationship test and are upheld if they are rationally related to some legitmate governmental interest. United States Department of Agriculture v. Moreno, 413 U.S. 528, 93 S. Ct. 2821, 37 L.Ed.2d 782 (1973); San Antonio School District v. Rodriques, 411 U.S. 1, 92 S.Ct. 1278, 36 L.Ed.2d 16 (1973). If, however, the classification impinges upon the fundamental rights or constitutes a suspect classification, it is subjected to strict scrutiny and can be upheld only if it is necessary to promote compelling governmental interests and is narrowly drawn to express only such interests. Roe v. Wade, 410 U.S. 113, 155, 93 S. Ct. 705, 35 L.Ed.2d 147 (173); Shapiro v. Thompson, 394 U.S. 618, 634, 89 S. Ct. 1322, 22 L.Ed.2d 600 (1969).

[10][11] In our society, marriage has long been regarded as one of the most basic social institutions, and the corresponding individual interest involved have been recognized as within the constitutional rights of privacy as enunciated in Roe v. Wade, supra, 410 U.S. at 152-153, 93 S. Ct. 705. As Mr. Justice Douglas, writing for the majority in Griswold v. Connecticut, 381 U.S. 479, 486, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965), stated:

"We deal with a right of privacy older than the Bill of Rights older than our political parties, older than our school system. Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decision."
A long line of decisions make it evident that although not explicitly set forth in the constitution, there is a constitutionally protected right to marry which occupies the status of being a fundamental right. Roe v. Wade, supra 410 U.S. at 152, 93 S.Ct. 705; United States v. Kras, 409 U.S. 434, 444, 93 S. Ct 631, 34 L.Ed.ed 626 (1973); Boddie v. Connecticut, 401 U.S. 371, 376, 91 S. Ct. 780, 28 L.Ed.2d 113 (1971) Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); Griswold v. Connecticut, supra, 381 U.S. at 486, 495, 85 S.Ct. 1678; Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655, (1942); Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). Lower federal courts have also recognized the importance of the interests associated with marriage and have afforded them constitutional protection. See, e.g., O'Neil v. Dent, 364 F.Supp. 565, 568-569 (E.D.N.Y.1973); Holt v. Shelton, 341 F.Supp. 821, 822-823 (M.D.Tenn.1972); Wymelenberg v. Syman, 328 F.Supp. 1353, 1354 (E.D.Wis.1971).

[12] It is apparent that the challenged statute infringes upon plaintiff Redhail's ability to marry. In contrast to all other Wisconsin residents, he, and all the members of the class he represents, must obtain court permission before any county clerk in Wisconsin will issue a marriage license. Furthermore, other provisions of the statute give it extraterritorial effect, making *1070 it impossible for Redhail, or anyone in the plaintiff class, to enter into a valid marriage anywhere without a court order. The

statute's requirement that all members of the plaintiff class obtain court permission to marry does, in a very concrete way, limit their right to marry in a manner not visited upon all other residents of Wisconsin. Since the classification created by the statute places substantial burdens on the ability of the class members to marry, it affects their fundamental rights and must be subjected to strict scrutiny. –

Additionally, the statute places a special burden on some members of the plaintiff class. In Redhail's case, because of his poverty he has been unable to satisfy the support obligation ordered in the paternity action, and, hence, a state court could not grant him permission to marry. Other members of the plaintiff class are barred from obtaining court permission because although they have fulfilled their support obligations, their minor issue are public charges or likely to become such. [FN5] These members of the plaintiff class would not usually have the financial resources to voluntarily obviate any necessity for governmental aid to their children and to further assure that such aid would not be necessary in the future.

FN5. Vernon T. Leipzig, Jr. the plaintiff in the companion case entitled Leipzig v. Pallamolla, D.C., 418 F. Supp 1073, had fully satisfied his child support obligations at the time he petitioned for permission to remarry. Nevertheless, Branch 2 of the County Court, Kenosha County, Wisconsin, denied permission because the four minor children of Leipzig's first marriage were then receiving AFDC benefits.

While wealth discrimination alone has not been held by the Court to be an adequate basis for involving strict scrutiny, San Antonio School District v. Rodriguez, 411 U.S. 1, 29, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), classifications based on wealth have been overturned in the area of voting, see, e.g., Bullock v.

Carter, 405 U.S. 134, 92 S.Ct.849, 31 L.Ed.2d 92 (1972) (primary filing fee requirement); Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (poll tax); criminal procedure, see, e.g., Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L.Ed.2d 811 (1963) (counsel on direct appeal); Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (transcripts); and incarceration, Tate v. Short, 401 U.S. 395, 91 S. ct. 668, 28 L.Ed.2d 130 (1971); William v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970). The Court in Rodriguez noted at 411 U.S. at page 20, 93 S.Ct. at page 1290:

"*** The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. ***"

[13] The characteristics identified by the Court in Rodriguez are present here with respect to some members of the plaintiff class. Because they lack sufficient financial resources, some of them are unable to fulfill support obligations, while others who have satisfied their support obligations lack the additional wealth required to insure threat their minor issue are not public charges nor likely to become such. In both instances, these class members cannot obtain permission to marry. The wealth discrimination inherent in the statute thus provides an additional justification for applying the strict scrutiny test.

Defendant Zablocki and the state have urged that instead of the strict scrutiny test, a more flexible "sliding scale" equal protection approach should be utilized here. See, Rodriguez, supra, at 98-110, 93 S.Ct. at 1278 (Marshall, Jr., dissenting); Borass v.

Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), reversed, sub nom. Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974); Women's Liberation Union of Rhode Island, Inc. v. Israel, 379 F.Supp. 44, 49-50 (D.R.I.1974), aff'd, 512 F.2d 106 (1st Cir. 1975); Timberlake v. Kenkel. 369 F.Supp. 456 (E.D.Wis.1974) (Reynold, J.), vacated and remanded, 510 *1071 F.2d 976 (7th Cir. 1975). See generally, Gunther, The Supreme Court 1971 Term, Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection, 86 Harv.L.Rev. 1(1972).

[14] There are several reasons, however, why a sliding scale equal protection analysis is not appropriate in this case. First, it is not apparent which contexts require application of the more flexible equal protection approach. Contrast, San Antonio School District v. Rodriguez, supra, 411 U.S. at 30-31, 93 S.Ct. at 1278, and Village of Belle Terre v. Boraas, supra, with Jimenz v. Weinberger, 417 U.S. 628, 94 S. Ct. 2496, 41 L.Ed.2d 363 (1974); United States Department of Agriculture v. Moreno, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972); Reed v Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). Moreover, despite the concern voiced by Mr. Justice Marshall in his dissent in Sosno v. Iowa, 419 U.S. 393, 418-419, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), the opinion of the Court in that case is devoid of language indicating that strict scrutiny is no longer to be applied to classifications which infringe upon fundamental rights, such as marriage, and the result in Sosna does not vitiate earlier decisions mandating use of the strict scrutiny test. [FN6] Additionally, it is very questionable whether the statue could be upheld by using a sliding scale analysis, since less restrictive means exist by which the governmental interests may be furthered. See, United States Department of Agriculture v. Moreno, supra, 413 U.S. at 536-537, 93

S.Ct. at 2821 (1973); Timberlake v. Kenkel, supra at 466-468. The classification created by the challenged statute must, therefore, be measured against the requirements of the strict scrutiny test.

FN6. In Sosna v. Iowa, supra a one-year durational residency requirement for divorce was upheld against attacks based on the rights to interstate travel and to due process. The substance of the court's approach defies simple characterization, although it did state that the residency requirement "may reasonable be justified on ground other than purely budgetary considerations or administrative convenience," supra, at 406, 95 S.Ct. at 561, and that the plaintiff therein "was not irretrievable foreclosed from obtaining some part of what she sought." Id., at 406, 95 S.Ct. at 561. Whether Sosna foreshadows a new approach to statutes restricting "fundamental rights" remains uncertain.

C.

[15] Where a statutory classification is tested against the requirements of the strict scrutiny test "***the state bears the burden of showing how compelling its interest may be; depending upon how compelling its interest may be, showing that the specific measure is necessary to its achievement; and showing that the specific measure is sufficiently narrowly drawn to achieve the state's interest. Roe v. Wade, 410 U.S. 113, 155, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600(1969); Aptheker v. Secretary of State, 378 U.S. 500, 508, 84 S.Ct.1659, 12 L.Ed.2d 992 (1964)." Baird v.Lynch, 390 F.Supp. 740, 749 (W.D.Wis.1974).

Defendant Zablocki and the state have urged that there are two interests furthered by the statute: (1) providing counseling to the prospective marriage partners emphasizing the necessity of fulfilling

preexisting child support obligations, and (2) protecting the welfare of the children whom members of the plaintiff class are under a court determined obligation to support. [FN7]

FN7. While in Beberfall v. Beberfall, 54 Wis.2d 329, 195 N.W.2d 625 (1972), the Wisconsin court stated that the policy behind s 245.10(1) "is to make certain that the children of the first marriage are not to become public charges," supra at 335, 195 N.W.2d at 629, the state's interest in saving welfare costs is not a compelling one, Shapiro v. Thompson, supra, 394 U.S. at 633, 89 S.Ct. at 1322, and both defendant Zablocki and the state have conceded this. Additionally, there are other statutory tools which they state may use to enforce child welfare support obligations and avoid increased welfare expenses.

*1072 [16] There is some evidence that one of the chief purposes of s 245.10(1) was to insure that persons who had failed to fulfill support obligations arising from a previous marriage be counseled before they incurred new obligations. See, 28 W.S.A s 245.10 Legislative Council Notes, 1959, 1975 pocket part, at 36; Wisconsin Legislative Council General Report, Vol.5, at 68 (1959). The state's interest in such counseling is not, however, of sufficient importance to justify s 245.10(1). The statute doe not simply provide for mandatory counseling before a second marriage, but prohibits remarriage without court permission which can be granted only if the license applicant has fulfilled support obligations and if the minor children are not public charges or likely to become such. The state's interest in counseling is not, therefore, sufficient to justify the restriction on plaintiff's marital rights because it is not a sufficiently "compelling" state interest and the statute is also not "narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. 113, 155, 93 S.Ct. 705, 728, 35 L.Ed.2d 147 (1973).

[17] The second state interest assertedly furthered by the state statute safeguarding the welfare of children might conceivable be termed both a legitimate and "compelling" governmental interest. It does not, however, justify the restriction on the rights of plaintiff class imposed by s 245.10(1), since the statute is not necessary to the achievement of this interest.

Wisconsin law already has several statutory means whereby support obligations may be enforced without restricting the right to marry. If the children are issue of a previous marriage, s 247.232 and s 247.265 give the judge and family court commissioner power to order the parent to make a wage assignment, and under s 295.03 disobedience of a court order to pay child support may be punished as civil contempt without proof of personal demand for payment and refusal to pay. If the support obligation arises through a paternity action, the court can order the parent to execute a wage assignment, s 52.21(2), order commitment to the county jail, s 52.39, or subject the parent to civil contempt proceedings, s 52.40. Besides these civil remedies, the state may charge a nonsupporting parent with the felony of abandonment of a minor child, s 52.05, or the misdemeanor offense of failure to support a minor child under s 52.055. By adroit use of probation and the Huber law, s 56.08, it can be assured that parents found guilty of these criminal penalties will comply with their support obligations. These statutory provisions give the state alternative means of enforcing the child support obligations of the plaintiff class members which do not abridge their rights to marry.

Furthermore, for those members of the plaintiff class who children are public charges, allowing their marriage will have not effect on the children's welfare, since AFDC and other welfare programs will continue to provide support for the children. It is

also reasonable to believe that at least some members of the plaintiff class will better their financial circumstances by marriage due to the likelihood of a working spouse. [FN8]

FN8. As the Court noted in Taylor v. Louisiana, 419 U.S. 522, 535 n. 17, 95 S. Ct. 692, 42 L.Ed.2d 690 (1975), Department of Labor statistics indicate that as of October 1974, 54.2% of all women between ages 18 and 64 were in the labor force.

[18][19] Application of the strict scrutiny test thus leads inexorably to the conclusion that the challenged statute cannot stand. While it is true that the state has legitimate and substantial interests in regulating the domestic relations of its residents, Sosna v. Iowa, 419 U.S. 393, 404, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), the statute at issue here does not deal with areas such as the age, health, and competency which may be required by legislation of persons desirous of contracting marriage. The interference with the constitutionally protected right to marry caused by the challenged statute cannot withstand close scrutiny, and it therefore runs afoul of the equal protection clause.

For the foregoing reason,
*1073 IT IS ORDERED that the clerk of court enter judgment in favor of the plaintiff Roger G. Redhail and the class he represents, and against defendant Thomas E. Zablocki and the class he represents declaring s 245.10(1), (4), and (5), Wis.Stats. (1973), unconstitutional under the equal protection clause of the Fourteenth Amendment to the United States Constitution and invalid, void, and of no effect.

IT IS FURTHER ORDERED that defendant Thomas E. Zablocki, the class he represents, and their officers, agents, servants, employees, and their successors and those persons in active concert or participation with them who receive actual notice of the judgment

be permanently enjoined from denying applications for marriage licenses on the ground that the applicant has failed to comply with the class he represents.

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U.S. Supreme Court
BODDIE v. CONNECTICUT,
401 U.S. 371 (1971)
401 U.S. 371
BODDIE ET AL. v. CONNECTICUT ET AL.
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT
No. 27.
Argued December 8, 1969
Reargued November 17, 1970
Decided March 2, 1971

In view of the basic position of the marriage relationship in our society and the state monopolization of the means for dissolving that relationship, due process of law prohibits a State from denying, solely because of inability to pay court fees and costs, access to its courts to indigents who, in good faith, seek judicial dissolution of their marriage. Pp. 374-383.286 F. Supp. 968, reversed.
HARLAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed an opinion concurring in the result, post, p. 383. BRENNAN, J., filed an opinion concurring in part, post, p. 386. BLACK, J., filed a dissenting opinion, post, p. 389.
Arthur B. LaFrance reargued the cause and filed briefs for appellants.Raymond J. Cannon, Assistant Attorney General of Connecticut, reargued the cause for appellees. With him on the brief were Robert K. Killian, Attorney General, and William S. Kaplan.
Allan Ashman filed a brief for the National Legal Aid and Defender Association as amicus curiae urging reversal.
Briefs of amici curiae urging affirmance were filed by Francis B. Burch, Attorney General of Maryland, and J. Michael McWilliams, Assistant Attorney General,

joined by George F. Kugler, Jr., Attorney General of New Jersey, and Stephen Skillman, Assistant Attorney General, and by the following Attorneys General: David P. [401 U.S. 371, 372] Buckson of Delaware, Jack P. F. Gremillion of Louisiana, Clarence A. H. Meyer of Nebraska, Harvey Dickerson of Nevada, Helgi Johanneson of North Dakota, and Lee Johnson of Oregon.

MR. JUSTICE HARLAN delivered the opinion of the Court.

Appellants, welfare recipients residing in the State of Connecticut, brought this action in the Federal District Court for the District of Connecticut on behalf of themselves and others similarly situated, challenging, as applied to them, certain state procedures for the commencement of litigation, including requirements for payment of court fees and costs for service of process, that restrict their access to the courts in their effort to bring an action for divorce.

It appears from the briefs and oral argument that the average cost to a litigant for bringing an action for divorce is $60. Section 52-259 of the Connecticut General Statutes provides:

"There shall be paid to the clerks of the supreme court or the superior court, for entering each civil cause, forty-five dollars . . . ."

An additional $15 is usually required for the service of process by the sheriff, although as much as $40 or $50 may be necessary where notice must be accomplished by publication.1

There is no dispute as to the inability of the named appellants in the present case to pay either the court fees required by statute or the cost incurred for the service of process. The affidavits in the record establish that appellants' welfare income in each instance barely suffices [401 U.S. 371, 373] to meet the costs of the daily essentials of life and includes no

allotment that could be budgeted for the expense to gain access to the courts in order to obtain a divorce. Also undisputed is appellants' "good faith" in seeking a divorce.Assuming, as we must on this motion to dismiss the complaint, the truth of the undisputed allegations made by the appellants, it appears that they were unsuccessful in their attempt to bring their divorce actions in the Connecticut courts, simply by reason of their indigency. The clerk of the Superior Court returned their papers "on the ground that he could not accept them until an entry fee had been paid." App. 8-9. Subsequent efforts to obtain a judicial waiver of the fee requirement and to have the court effect service of process were to no avail. Id., at 9.Appellants thereafter commenced this action in the Federal District Court seeking a judgment declaring that Connecticut's statute and service of process provisions, "requiring payment of court fees and expenses as a condition precedent to obtaining court relief [are] unconstitutional [as] applied to these indigent [appellants] and all other members of the class which they represent."

As further relief, appellants requested the entry of an injunction ordering the appropriate officials to permit them "to proceed with their divorce actions without payment of fees and costs." A three-judge court was convened pursuant to 28 U.S.C. 2281, and on July 16, 1968, that court concluded that "a state [may] limit access to its civil courts and particularly in this instance, to its divorce courts, by the requirement of a filing fee or other fees which effectively bar persons on relief from commencing actions therein." 286 F. Supp. 968, 972.

We noted probable jurisdiction, 395 U.S. 974 (1969). The case was heard at the 1969 Term and thereafter was [401 U.S. 371, 374] set for reargument at the present Term. 399 U.S. 922 (1970). We now reverse.2 Our conclusion is that, given the basic position of the

marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

I

At its core, the right to due process reflects a fundamental value in our American constitutional system. Our understanding of that value is the basis upon which we have resolved this case.Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner.

Without such a "legal system," social organization and cohesion are virtuallyimpossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature." [401 U.S. 371, 375]

American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the

Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle. Such litigation has, however, typically involved rights of defendants - not, as here, persons seeking access to the judicial process in the first instance. This is because our society has been so structured that resort to the courts is not usually the only available, legitimate means of resolving private disputes. Indeed, private structuring of individual relationships and repair of their breach is largely encouraged in American life, subject only to the caveat that the formal judicial process, if resorted to, is paramount. Thus, this Court has seldom been asked to view access to the courts as an element of due process. The legitimacy of the State's monopoly over techniques of final dispute settlement, even where [401 U.S. 371, 376] some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain. But the successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' rights. For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy. Recognition of this theoretical framework illuminates the precise issue presented in this case. As this Court

on more than one occasion has recognized, marriage involves interests of basic importance in our society. See, e. g., Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923). It is not surprising, then, that the States have seen fit to oversee many aspects of that institution. Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval.

Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery.

Thus, although they assert here due process rights as would-be plaintiffs, we think appellants' plight, because resort to the state courts is the only avenue to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to [401 U.S. 371, 377] defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one. In this posture we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum.

II

These due process decisions, representing over a hundred years of effort by this Court to give concrete

embodiment to this concept, provide, we think, complete vindication for appellants' contentions. In particular, precedent has firmly embedded in our due process jurisprudence two important principles upon whose application we rest our decision in the case before us.

A

Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that "[w]herever one is assailed in his person or his property, there he may defend," Windsor v. McVeigh, 93 U.S. 274, 277 (1876). See Baldwin v. Hale, 1 Wall. 223 (1864); Hovey v. Elliott, 167 U.S. 409 (1897).

The theme that "due process of law signifies a right to be heard in one's defense," Hovey v. Elliott, supra, at 417, has continually recurred in the years since Baldwin, Windsor, and Hovey. 3 Although "[m]any controversies [401 U.S. 371, 378] have raged about the cryptic and abstract words of the Due Process Clause," as Mr. Justice Jackson wrote for the Court in Mullane v. Central Hanover Tr. Co., 339 U.S. 306 (1950), "there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Id., at 313.

Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, see Windsor, supra, at 278, or who, without justifiable excuse, violates a procedural rule requiring the

production of evidence necessary for orderly adjudication, Hammond Packing Co. v. Arkansas, 212 U.S. 322, 351 (1909). What the Constitution does require is "an opportunity . . . granted at a meaningful time and in a meaningful manner," Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (emphasis added), "for [a] hearing appropriate to the nature of the case," Mullane v. Central Hanover Tr. Co., supra, at 313. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. 4 That the hearing required by due process [401 U.S. 371, 379] is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, 5 except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.6 In short, "within the limits of practicability," id., at 318, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause.

B

Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question. Thus, in cases involving religious freedom, free speech or assembly, this Court has often held that a valid statute was unconstitutionally applied in particular circumstances because it interfered with an individual's exercise of those rights. 7 No less than these rights, the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by

particular laws [401 U.S. 371, 380] that operate to jeopardize it for particular individuals. See Mullane v. Central Hanover Tr. Co., supra; Covey v. Town of Somers, 351 U.S. 141 (1956). In Mullane this Court held that the statutory provision for notice by publication in a local newspaper, although sufficient as to beneficiaries of a trust whose interests or addresses were unknown to the trustee, was not sufficient notice under the Due Process Clause for known beneficiaries. Similarly, Covey held that notice by publication in a foreclosure action, even though sufficient to provide a normal person with an opportunity for a hearing, was not sufficient where the defendant was a known incompetent. The Court expressly rejected an argument that "the Fourteenth Amendment does not require the State to take measures in giving notice to an incompetent beyond those deemed sufficient in the case of the ordinary taxpayer." Id., at 146. Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due.

III

Drawing upon the principles established by the cases just canvassed, we conclude that the State's refusal to admit these appellants to its courts, the sole means in Connecticut for obtaining a divorce, must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages, and, in the absence of a sufficient countervailing [401 U.S. 371, 381] justification for the State's action, a denial of due

process. 8 The arguments for this kind of fee and cost requirement are that the State's interest in the prevention of frivolous litigation is substantial, its use of court fees and process costs to allocate scarce resources is rational, and its balance between the defendant's right to notice and the plaintiff's right to access is reasonable.In our opinion, none of these considerations is sufficient to override the interest of these plaintiff-appellants in having access to the only avenue open for dissolving their allegedly untenable marriages. Not only is there no necessary connection between a litigant's assets and the seriousness of his motives in bringing suit,9 but it is here beyond present dispute that appellants bring these actions in good faith. Moreover, other alternatives exist to fees and cost requirements as a means for conserving the time of courts and protecting parties from frivolous litigation, [401 U.S. 371, 382] such as penalties for false pleadings or affidavits, and actions for malicious prosecution or abuse of process, to mention only a few. In the same vein we think that reliable alternatives exist to service of process by a state-paid sheriff if the State is unwilling to assume the cost of official service. This is perforce true of service by publication which is the method of notice least calculated to bring to a potential defendant's attention the pendency of judicial proceedings. See Mullane v. Central Hanover Tr. Co., supra. We think in this case service at defendant's last known address by mail and posted notice is equally effective as publication in a newspaper. We are thus left to evaluate the State's asserted interest in its fee and cost requirements as a mechanism of resource allocation or cost recoupment. Such a justification was offered and rejected in Griffin v. Illinois, 351 U.S. 12 (1956). In Griffin it was the requirement of a transcript beyond the means of the indigent that blocked access to the judicial process. While in

Griffin the transcript could be waived as a convenient but not necessary predicate to court access, here the State invariably imposes the costs as a measure of allocating its judicial resources. Surely, then, the rationale of Griffin covers this case.

IV

In concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the bona fides of both appellants' indigency and desire for divorce are here beyond dispute. We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, [401 U.S. 371, 383] for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.

Reversed.

Footnotes

[Footnote 1] App. 9. The dollar figures are averages taken from the undisputed allegations of the complaint. The particular fee the sheriff receives from the plaintiff for service of process in any one case depends on the distance he must travel to

effectuate service of process. Conn. Gen. Stat. Rev. 52-261 (1968).

[Footnote 2] Following colloquy at the oral reargument as to the possible availability of public or private funds to enable plaintiffs-appellants to defray the expense requirements at issue in this case, the parties submitted further papers on this score. Nothing in these materials would justify our declining to adjudicate the constitutional question squarely presented by this record.

[Footnote 3] See Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Armstrong v. Manzo, 380 U.S. 545 (1965); Schroeder v. New York, 371 U.S. 208, 212 (1962); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 338 [401 U.S. 371, 378] (1963); Covey v. Town of Somers, 351 U.S. 141 (1956); Mullane v. Central Hanover Tr. Co., 339 U.S. 306 (1950);Anderson Nat. Bank v. Luckett, 321 U.S. 233, 246 (1944); Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-153 (1941); Morgan v. United States, 304 U.S. 1 (1938); United States v. Illinois Central R. Co., 291 U.S. 457, 463 (1934); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930); Coe v. Armour Fertilizer Works, 237 U.S. 413, 423 (1915); Londoner v. Denver, 210 U.S. 373, 385-386 (1908); Louisville & Nashville R. Co. v. Schmidt, 177 U.S. 230, 236 (1900).

[Footnote 4] Compare Goldberg v. Kelly, supra, with In re Winship, 397 U.S. 358 (1970). See also Bowles v. Willingham, 321 U.S. 503, 520-521 (1944).

[Footnote 5] Goldberg v. Kelly, supra; Sniadach v. Family Finance Corp., supra; Opp Cotton Mills v. Administrator, supra, at 152-153; United States v. Illinois Central R. Co., supra, at 463; Coe v. Armour Fertilizer Works, supra.

[Footnote 6] Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); Fahey v.

Mallonee, 332 U.S. 245 (1947); Bowles v. Willingham, supra; Yakus v. United States, 321 U.S. 414 (1944).
[Footnote 7] E. g., Schneider v. State, 308 U.S. 147 (1939); Cantwell v. Connecticut, 310 U.S. 296 (1940); Bates v. Little Rock, 361 U.S. 516, 527 (1960); Sherbert v. Verner, 374 U.S. 398 (1963).
[Footnote 8] At least one court has already recognized the special nature of the divorce action. Justice Sobel in a case like that before us took note of the State's involvement in the marital relationship: "Marriage is clearly marked with the public interest. In this State, a marriage cannot be dissolved except by `due judicial proceedings. . . .' We have erected by statute a money hurdle to such dissolution by requiring in many circumstances the service of a summons by publication . . . . This hurdle is an effective barrier to [plaintiff's] access to the courts. The loss of access to the courts in an action for divorce is a right of substantial magnitude when only through the courts may redress or relief be obtained." Jeffreys v. Jeffreys, 58 Misc. 2d 1045, 1056, 296 N. Y. S. 2d 74, 87 (1968). See also Brown v. Chastain, 416 F.2d 1012, 1014 (CA5 1969) (Rives, J., dissenting).
[Footnote 9] We think Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), has no bearing on this case. Differences between divorce actions and derivative actions aside, unlike Cohen, where we considered merely a statute on its face, the application of this statute here operates to cut off entirely access to the courts.
MR. JUSTICE DOUGLAS, concurring in the result.
I believe this case should be decided upon the principles developed in the line of cases marked by Griffin v. Illinois, 351 U.S. 12. There we considered a state law which denied persons convicted of a crime full appellate review if they were unable to pay for a transcript of the trial. MR. JUSTICE BLACK's opinion

announcing the judgment of the Court stated:

"Such a denial is a misfit in a country dedicated to affording equal justiceto all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of a trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." Id., at 19.

Griffin has had a sturdy growth. "Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." Roberts v. LaVallee, 389 U.S. 40, 42. See also Williams v. Oklahoma City, 395 U.S. 458; Long v. District Court of Iowa, 385 U.S. 192; Draper v. Washington, 372 U.S. 487. But [401 U.S. 371, 384] Griffin has not been limited to securing a record for indigents who appeal their convictions. If the more affluent have counsel on appeal, then counsel for indigents must be provided on appeal of a criminal conviction. Douglas v. California, 372 U.S. 353. The tie to Griffin was explicit. "In either case [Griffin or Douglas] the evil is the same: discrimination against the indigent." Id., at 355.

In Burns v. Ohio, 360 U.S. 252, we invalidated a procedure whereby cases within the jurisdiction of the state supreme court would not be considered if a person could not pay the filing fee. In Smith v. Bennett, 365 U.S. 708, we held that requiring indigents to pay filing fees before a writ of habeas corpus could be considered in state court was invalid under the Equal Protection Clause. Here Connecticut has provided requirements for married couples to obtain divorces and because of filing fees and service of process one of the requirements is having the necessary money. The more affluent can obtain a

divorce; the indigent cannot. This situation is comparable to Burns v. Ohio, and Smith v. Bennett.

The Due Process Clause on which the Court relies has proven very elastic in the hands of judges. "The doctrine that prevailed in Lochner [v. New York, 198 U.S. 45], Coppage [v. Kansas, 236 U.S. 1], Adkins [v. Children's Hospital, 261 U.S. 525], [Jay] Burns [Baking Co. v. Bryan, 264 U.S. 504], and like cases - that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely - has long since been discarded." Ferguson v. Skrupa, 372 U.S. 726, 730. I would not invite its revival.

Whatever residual element of substantive law the Due Process Clause may still have (Thompson v. Louisville, 362 U.S. 199), it essentially regulates procedure.

Sniadach v. Family Finance Corp., 395 U.S. 337; Wisconsin v. Constantineau, 400 U.S. 433. The Court today puts [401 U.S. 371, 385] "flesh" upon the Due Process Clause by concluding that marriage and its dissolution are so important that an unhappy couple who are indigent should have access to the divorce courts free of charge. Fishing may be equally important to some communities. May an indigent be excused if he does not obtain a license which requires payment of money that he does not have? How about a requirement of an onerous bond to prevent summary eviction from rented property? The affluent can put up the bond, though the indigent may not be able to do so. See Williams v. Shaffer, 385 U.S. 1037. Is housing less important to the mucilage holding society together than marriage?

The examples could be multiplied. I do not see the length of the road we must follow if we accept my Brother HARLAN'S invitation. The question historically

has been whether the right claimed is "of the very essence of a scheme of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325. That makes the test highly subjective and dependent on the idiosyncrasies of individual judges as Lochner, Coppage, and Adkins illustrate.

The reach of the Equal Protection Clause is not definable with mathematical precision. But in spite of doubts by some,* as it has been construed, rather definite guidelines have been developed: race is one (Strauder v. West Virginia, 100 U.S. 303; McLaughlin v. Florida, 379 U.S. 184); alienage is another (Takahashi v. Fish & Game Comm'n, 334 U.S. 410); religion is another (Sherbert v. Verner, 374 U.S. 398); poverty is still another (Griffin v. Illinois, supra); and class or caste yet another (Skinner v. Oklahoma, 316 U.S. 535).

The power of the States over marriage and divorce is, of course, complete except as limited by specific constitutional provisions. But could a State deny divorces to domiciliaries who were Negroes and grant them to whites? [401 U.S. 371, 386] Deny them to resident aliens and grant them to citizens? Deny them to Catholics and grant them to Protestants? Deny them to those convicted of larceny and grant them to those convicted of embezzlement?

Here the invidious discrimination is based on one of the guidelines: poverty. An invidious discrimination based on poverty is adequate for this case. While Connecticut has provided a procedure for severing the bonds of marriage, a person can meet every requirement save court fees or the cost of service of process and be denied a divorce. Connecticut says in its brief that this is justified because "the State does not favor divorces; and only permits a divorce to be granted when those conditions are found to exist, in respect to one or the other of the named parties, which seem to the legislature to make it probable

that the interests of society will be better served and that parties will be happier, and so the better citizens, separate, than if compelled to remain together."

Thus, under Connecticut law divorces may be denied or granted solely on the basis of wealth. Just as denying further judicial review in Burns and Smith, appellate counsel in Douglas, and a transcript in Griffin created an invidious distinction based on wealth, so, too, does making the grant or denial of a divorce to turn on the wealth of the parties. Affluence does not pass muster under the Equal Protection Clause for determining who must remain married and who shall be allowed to separate.

[Footnote *] See Karst, Invidious Discrimination, 16 U. C. L. A. L. Rev. 716 (1969).

MR. JUSTICE BRENNAN, concurring in part.

I join the Court's opinion to the extent that it holds that Connecticut denies procedural due process in denying the indigent appellants access to its courts for the sole reason that they cannot pay a required fee.

> "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with [401 U.S. 371, 387] a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

When a State's interest in imposing a fee requirement on an indigent is compared to the indigent's interest in being heard, it is clear that the latter is the weightier. It is an unjustifiable denial of a hearing, and therefore a denial of due process, to

close the courts to an indigent on the ground of nonpayment of a fee.

But I cannot join the Court's opinion insofar as today's holding is made to depend upon the factor that only the State can grant a divorce and that an indigent would be locked into a marriage if unable to pay the fees required to obtain a divorce. A State has an ultimate monopoly of all judicial process and attendant enforcement machinery. As a practical matter, if disputes cannot be successfully settled between the parties, the court system is usually

"the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court." Ante, at 376-377.

In this case, the Court holds that Connecticut's unyielding fee requirement violates the Due Process Clause by denying appellants "an opportunity to be heard upon their claimed right to a dissolution of their marriages" without a sufficient countervailing justification. Ante, at 380. I see no constitutional distinction between appellants' attempt to enforce this state statutory right and an attempt to vindicate any other right arising under federal or state law. If fee requirements close the courts to an indigent he can no more invoke the aid of the courts for other forms of relief than he can escape the legal incidents of a marriage. The right to be heard in some way at some time extends [401 U.S. 371, 388] to all proceedings entertained by courts.

The possible distinctions suggested by the Court today will not withstand analysis. In addition, this case presents a classic problem of equal protection of the laws. The question that the Court treats exclusively as one of due process inevitably implicates considerations of both due process and equal protection. Certainly, there is at issue the

denial of a hearing, a matter for analysis under the Due Process Clause. But Connecticut does not deny a hearing to everyone in these circumstances; it denies it only to people who fail to pay certain fees. The validity of this partial denial, or differentiation in treatment, can be tested as well under the Equal Protection Clause.

In Griffin v. Illinois, 351 U.S. 12 (1956), we held under the Equal Protection Clause as well as the Due Process Clause that a State may not deny a free transcript to an indigent, where the transcript is necessary for a direct appeal from his conviction. Subsequently, we have applied and extended that principle in numerous criminal cases. See, e. g., Eskridge v. Washington State Board of Prison Terms & Paroles, 357 U.S. 214 (1958); Burns v. Ohio, 360 U.S. 252 (1959); Smith v. Bennett, 365 U.S. 708 (1961); Coppedge v. United States, 369 U.S. 438 (1962); Lane v. Brown, 372 U.S. 477 (1963); Draper v. Washington, 372 U.S. 487 (1963); Rinaldi v. Yeager, 384 U.S. 305 (1966); Long v. District Court of Iowa, 385 U.S. 192 (1966); Roberts v. LaVallee, 389 U.S. 40 (1967); Gardner v. California, 393 U.S. 367 (1969). The rationale of Griffin covers the present case. Courts are the central dispute-settling institutions in our society. They are bound to do equal justice under law, to rich and poor alike. They fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to indigent [401 U.S. 371, 389] plaintiffs altogether. Where money determines not merely "the kind of trial a man gets," Griffin v. Illinois, supra, at 19, but whether he gets into court at all, the great principle of equal protection becomes a mockery. A State may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee. Cf. Harper v. Virginia Board of Elections, 383 U.S. 663 (1966). In my view, Connecticut's fee

requirement, as applied to an indigent, is a denial of equal protection.

MR. JUSTICE BLACK, dissenting.

This is a strange case and a strange holding. Absent some specific federal constitutional or statutory provision, marriage in this country is completely under state control, and so is divorce. When the first settlers arrived here the power to grant divorces in Great Britain was not vested in that country's courts but in its Parliament. And as recently as 1888 this Court in Maynard v. Hill, 125 U.S. 190, upheld a divorce granted by the Legislature of the Territory of Oregon. Since that time the power of state legislatures to grant divorces or vest that power in their courts seems not to have been questioned. It is not by accident that marriage and divorce have always been considered to be under state control. The institution of marriage is of peculiar importance to the people of the States. It is within the States that they live and vote and rear their children under laws passed by their elected representatives. The States provide for the stability of their social order, for the good morals of all their citizens, and for the needs of children from broken homes. The States, therefore, have particular interests in the kinds of laws regulating their citizens when they enter into, maintain, and dissolve marriages. The power of the States over marriage and [401 U.S. 371, 390] divorce is complete except as limited by specific constitutional provisions. Loving v. Virginia, 388 U.S. 1, 7-12 (1967).

The Court here holds, however, that the State of Connecticut has so little control over marriages and divorces of its own citizens that it is without power to charge them practically nominal initial court costs when they are without ready money to put up those costs. The Court holds that the state law requiring

payment of costs is barred by the Due Process Clause of the Fourteenth Amendment of the Federal Constitution. Two members of the majority believe that the Equal Protection Clause also applies. I think the Connecticut court costs law is barred by neither of those clauses.

It is true, as the majority points out, that the Court did hold in Griffin v. Illinois, 351 U.S. 12 (1956), that indigent defendants in criminal cases must be afforded the same right to appeal their convictions as is afforded to a defendant who has ample funds to pay his own costs. But in Griffin the Court studiously and carefully refrained from saying one word or one sentence suggesting that the rule there announced to control rights of criminal defendants would control in the quite different field of civil cases. And there are strong reasons for distinguishing between the two types of cases.

Criminal defendants are brought into court by the State or Federal Government to defend themselves against charges of crime. They go into court knowing that they may be convicted, and condemned to lose their lives, their liberty, or their property, as a penalty for their crimes. Because of this great governmental power the United States Constitution has provided special protections for people charged with crime. They cannot be convicted under bills of attainder or ex post facto laws. And numerous provisions of the Bill of Rights - the right to counsel, the right to be free from coerced [401 U.S. 371, 391] confessions, and other rights - shield defendants in state courts as well as federal courts. See, e. g., Benton v. Maryland, 395 U.S. 784 (1969); Duncan v. Louisiana, 391 U.S.145 (1968); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963). With all of these protections safeguarding defendants charged by government with crime, we quite naturally and quite properly held in Griffin that

the Due Process and Equal Protection Clauses both barred any discrimination in criminal trials against poor defendants who are unable to defend themselves against the State. Had we not so held we would have been unfaithful to the explicit commands of the Bill of Rights, designed to wrap the protections of the Constitution around all defendants upon whom the mighty powers of government are hurled to punish for crime.

Civil lawsuits, however, are not like government prosecutions for crime. Civil courts are set up by government to give people who have quarrels with their neighbors the chance to use a neutral governmental agency to adjust their differences. In such cases the government is not usually involved as a party, and there is no deprivation of life, liberty, or property as punishment for crime. Our Federal Constitution, therefore, does not place such private disputes on the same high level as it places criminal trials and punishment. There is consequently no necessity, no reason, why government should in civil trials be hampered or handicapped by the strict and rigid due process rules the Constitution has provided to protect people charged with crime.

This distinction between civil and criminal proceedings is implicit in Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), where we held that a statute requiring some, but not all, plaintiffs in stockholder derivative actions to post a bond did not violate the Due Process or the Equal Protection Clause. The Cohen case is indistinguishable [401 U.S. 371, 392] from the one before us. In Cohen, as here, the statute applied to plaintiffs. In both situations the legal relationships involved are creatures of the State, extensively governed by state law. The effect of both statutes may be to deter frivolous or ill-considered suits, and in both instances the State has a considerable interest in the prevention of such

suits, which might harm the very relationship the State created and fostered. Finally, the effect of both statutes may be to close the state courts entirely to certain plaintiffs, a result the Court explicitly accepted in Cohen. See id., at 552. I believe the present case should be controlled by the Court's thorough opinion in Cohen.

The Court's suggested distinction of Cohen on the ground that the Court there dealt only with the validity of the statute on its face ignores the following pertinent language:

> "It is urged that such a requirement will foreclose resort by most stockholders to the only available judicial remedy for the protection of their rights. Of course, to require security for the payment of any kind of costs, or the necessity for bearing any kind of expense of litigation, has a deterring effect. But we deal with power, not wisdom; and we think, notwithstanding this tendency, it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met." Id., at 552. (Emphasis added.)

Rather, Cohen can only be distinguished on the ground that it involved a stockholders' suit, while this case involves marriage, an interest "of basic importance in our society." Thus the Court's opinion appears to rest solely on a philosophy that any law violates due process if it is unreasonable, arbitrary, indecent, deviates from the fundamental, is shocking to the conscience, or fails to meet [401 U.S. 371, 393] other tests composed of similar words or phrases equally lacking in any possible constitutional precision. These concepts, of course, mark no constitutional boundaries and cannot possibly depend upon anything but the belief of particular judges, at particular times, concerning particular interests which those judges have divined to be of "basic importance."

I do not believe the wise men who sought to draw a written constitution to protect the people from governmental harassment and oppression, who feared alike the king and the king's judges, would have used any such words or phrases. Such unbounded authority in any group of politically appointed or elected judges would unquestionably be sufficient to classify our Nation as a government of men, not the government of laws of which we boast. With a "shock the conscience"
test of constitutionality, citizens must guess what is the law, guess what a majority of nine judges will believe fair and reasonable. Such a test wilfully throws away the certainty and security that lies in a written constitution, one that does not alter with a judge's health, belief, or his politics. I believe the only way to steer this country towards its great destiny is to follow what our Constitution says, not what judges think it should have said.

For these reasons I am constrained to repeat what I said in dissent in Williams v. North Carolina, 325 U.S. 226, 271-274 (1945):

> "I cannot agree to this latest expansion of federal power and the consequent diminution of state power over marriage and marriage dissolution which the Court derives from adding a new content to the Due Process Clause. The elasticity of that clause necessary to justify this holding is found, I suppose, in the notion that it was intended to give this Court unlimited authority to supervise all assertions of [401 U.S. 371, 394] state and federal power to see that they comport with our ideas of what are `civilized standards of law.' . . . . . ". . . This perhaps is in keeping with the idea that the Due Process Clause is a blank sheet of paper provided for courts to make changes in the Constitution and the Bill of Rights in accordance

with their ideas of civilization's demands. I should leave the power over divorces in the states."

See also In re Winship, 397 U.S. 358, 377 (1970) (BLACK, J., dissenting).

One more thought about the Due Process and Equal Protection Clauses: neither, in my judgment, justifies judges in trying to make our Constitution fit the times, or hold laws constitutional or not on the basis of a judge's sense of fairness. The Equal Protection Clause is no more appropriate a vehicle for the "shock the conscience" test than is the Due Process Clause. See, e. g., my dissent in Harper v. Virginia Board of Elections, 383 U.S. 663, 675-680 (1966). The rules set out in the Constitution itself provide what is governmentally fair and what is not. Neither due process nor equal protection permits state laws to be invalidated on any such nonconstitutional standard as a judge's personal view of fairness. The people and their elected representatives, not judges, are constitutionally vested with the power to amend the Constitution. Judges should not usurp that power in order to put over their own views. Accordingly, I would affirm this case. [401 U.S. 371, 395]